BRIEF BANK

WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

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MOTIONS AND RESPONSES

Abandoned Property Expectation of Privacy

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant. _____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THE DEFENDANT ABANDONED HIS FANNY PACK AND HAS NO REASONABLE EXPECTATION OF PRIVACY IN ITS CONTENTS AND NO STANDING TO CHALLENGE THE LEGALITY OF ITS SEARCH.

The United States Supreme Court has uniformly held that:

> [T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action...This inquiry...normally embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy...The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable, whether...the individual's expectation, viewed objectively, is justifiable under the circumstances.

Smith v. Maryland, 442 U.S. 735, 740 (1978).

The Nevada Supreme Court dealt with the issue of abandonment many years ago. Oliver was arrested at a club in Las Vegas for traffic warrants, but was not searched incident to arrest. Oliver v. State, 85 Nev. 10, 11 (1969). When he walked out of the club, he tossed away a white object. The officer picked it up after it hit the ground and determined that it was a marijuana cigarette. The Court noted that the cigarette was not found incident to arrest, and held that "it was abandoned property when it was retrieved by the police officers." Id., at p. 12. The Court reiterated that "where police officers discovered evidence in a public area where it was voluntarily thrown, there was no search, and said: 'Looking at that which is open to view is not a search.'" Id. Further guidance on this issue has been provided by an abundance of federal case law on the topic.

"If a person has voluntarily abandoned property, he has no standing to complain of its search or seizure." United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976), citing, Abel v. United States, 362 U.S. 217, 240-41 (1960). "Abandonment is primarily a question of

intent, and intent may be inferred from words, acts, and other objective facts...Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." Id. (citations omitted). In deciding whether a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure, the court must look at "the totality of the circumstances, and two important factors are denial of ownership and physical relinquishment of the property." United States v. Nordling, 804 F.2d 1466, 1469 (9th Cir. 1986). However, abandonment does not justify a warrantless search or seizure if it was brought about by "unlawful police conduct." Jackson, supra, at p. 409.

Jackson was suspected of possessing narcotics. DEA agents approached him in an airport and asked to speak to him after identifying themselves. Jackson was carrying a suitcase, which he dropped, and then walked away. After taking a few steps, he was arrested. Jackson was advised of his rights and denied dropping the suitcase, claiming that it was not his and that he had never seen it before. The suitcase was searched and contained heroin. The court ruled that setting down the suitcase and walking a few steps away prior to arrest did not indicate an intent to abandon the suitcase without more; but concluded that those circumstances, combined with his post-arrest denial of any interest in the suitcase, constituted abandonment. Id., at pp. 410-11. As a result, Jackson lacked standing to object to its search. Id.

Nordling resembled a suspected rapist-murderer and was asked to step off an airplane about to depart. Nordling agreed. Nordling carried a tote bag onto the plane, but when asked by officers if he had any carry-on luggage he wished to bring with him, he said he did not and left his tote bag under the seat on the plane. Officers determined that Nordling was not the murder suspect, but he was further detained on suspicions of illegal drug or currency transactions. Nordling's tote bag was recovered by law enforcement and contained cocaine. The court held that Nordling had abandoned this bag and did not have standing to complain of its search or seizure. Nordling, supra, at p. 1469.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Acquittal Judgment of

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POINTS AND AUTHORITIES

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POINTS AND AUTHORITIES

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

For Appe11ate review of evidence supporting a jury's verdict, the question is not whether the Court is convinced of the defendant's guilt beyond a reasonable doubt or not, but whether the jury, acting reasonably, could have been convinced to that certitude by the evidence it had a right to consider. ~ Wilkins v. State, 96, Nev. 367, 375 (1980) . Plaintiff hereby submits that the test in the instant matter is the same under NRS 175.381(2). By also quoting this language, defendant appears to be in agreement. See also Dorman v. State, 622 P.2d 448, 453 (Ak. 1981)

However, defendant asks this Court to usurp the jury's constitutionally mandated ability to determine guilt or innocence. She requests a finding from the Court that as a matter of law the

evidence in this case was insufficient for a jury, acting reasonably, to convict her of Battery With A Deadly Weapon, a general intent crime.

NRS 175.381(2) permits the Court to enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. Insufficiency of the evidence occurs only when the prosecution has not produced a minimum threshold of evidence upon which a conviction could be based. State v. Walker, 109, Nev.Ad.Op. 104 (July 27, 1993). In other words, even if the State's evidence presented at trial was believed by the jury, it would still be insufficient to sustain a conviction. State v.
Walker supra. This would then require a release of the defendant and would be an absolute bar to a subsequent prosecution. State
v. Walker supra; State v. Wilson, 104 Nev. 405 (1988)

From the outset, this case has presented interesting and somewhat unique questions of fact for the trier of fact-a jury-eventually to decide. In this sense and in recognizing the role of the jury, our Supreme Court has stated, Judges possess no unique faculties for perceiving relationships, discerning contradictions, drawing inferences, and making measured judgments. Edwards v. State, 90 Nev. 255, 259 (1974) . It is for the jury to determine the weight and ability to give conflicting
testimony. Bolden v. State, 97 Nev. 71 (1981); Stewart v. State,
94 Nev. 378, 379 (1978) . The jury is certainly at liberty to
reject the defendant's version of the events. Harris v. State,
88 Nev. 385 (1972); See also, Glegola v. State, 110 Nev. Ad.Op.
43 (March 30, 1994) ; Rice v. State, 108 Nev. 43, 45 (1992) With
all due respect to this Honorable Court, its judgment (whether

different or not) should not simply be substituted for that of the jury.

NRS 175.381(2) clearly was not enacted to give every defendant two separate opportunities for an acquittal. It was designed to permit the Court to remedy an injustice caused by a situation in which, as a matter of law, the evidence cannot sustain a conviction. If the evidence reasonably justifies the jury verdict, inferences that are also consistent with innocence will not warrant interference with the jury's verdict. State v. Rhodig, 101 Nev. 608, 612 (1985)

Recognizing that state of mind may be inferred from conduct and the facts and circumstances surrounding it, the Court in Rhodig supra, reversed the District Court's judgment of acquittal and ordered the jury's guilty verdict be reinstated. Even in a situation in which the conviction is based entirely on circumstantial evidence, the theory that the jury's verdict cannot be supported if the evidence is as consistent with innocence as with guilt has long ago been laid to rest by many courts including the Ninth Circuit Court of Appeals. Evidence equally consistent with innocence as with guilt does not require granting a motion for judgment of acquittal. Schino v. U.s., 209 Fed.2d. 67, 72 (9th, 1954)

Judgment of acquittal should be entered only when there is no evidence from which a trier of fact could render a verdict of guilty. State v. Lyons, 838 P.2d 397 (Mont. 1992); State v. Webster, 824 P.2d 768, 770 (Ariz. App. 1991). The evidence must be reviewed in the light most favorable to the State. See Dorman v. State, supra. "The Court should not grant a motion for acquittal when reasonable minds could differ on the inferences to be drawn from the evidence." State v. Webster, supra.

Actual and Constructive Possession

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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

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COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

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ACTUAL AND CONSTRUCTIVE POSSESSION

"Possession may be actual or constructive." Glispey v. Sheriff, 89 Nev. 221, 510 P.2d 623 (1973). A person has constructive possession of a controlled substance only if the person maintains control or a right to control the contraband." Sheriff v. Shade, 109 Nev. 826, 858 P.2d 840 (1993). In narcotics cases, "possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to [his] dominion and control." Palmer v. State, 112 Nev. 763, 920 P.2d 112 (1996), citing Shade, supra, Nev. at 830, P.2d at 842.[1]

III. CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

[1]Exclusivity is not necessary however to support a conviction against a sole defendant. Two or more persons may have joint possession of a narcotic if jointly and knowingly they have its dominion and control Maskaly v. State, 85 Nev. 111, 450 P.2d 790 (1969), citing Doyle v. State, 82 Nev. 242, 415 P.2d 323 (1966).

Administrative Sanctions Double Jeopardy

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* * *

THE STATE OF NEVADA,

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_____/

APPELLANT'S OPENING BRIEF

COMES NOW, RICHARD A. GAMMICK, District Attorney, by and through , Deputy District Attorney of Washoe County, Nevada, and hereby files this appeal of the Justice Court's dismissal of this case on the basis of double jeopardy. The Justice Court abused its discretion when it determined that the administrative action taken by the employer prevented the State from proceeding on its criminal case. This Appeal is based upon the grounds set forth in the attached Points and

Authorities, all records and pleadings on file and any oral argument the Court should allow.

DATED this _____ day of _____, 2000.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

ISSUE

When a teacher hits a student, is the administrative action by the School Board of giving defendant unpaid leave so punitive in nature as to prevent a criminal prosecution for battery?

PROCEDURAL HISTORY

The Court granted the Motion to Dismiss stating that the

> "District appeals to have originally proceeded against the defendant under NRS 391.314(1). It subsequently disciplined him in a punitive manner under NRS 391.314(8). According to the documentation prepared by the District, the clear inference to be drawn is that the misconduct punished includes the conduct charged in this Criminal Complaint."

STATEMENT OF FACTS

DOUBLE JEOPARDY DOES NOT APPLY

The State contends that Double jeopardy does not apply for two reasons: (1) An administrative action is remedial, it is not criminal in nature and is not a trial for purposes of double jeopardy; (2) in addition, the administrator for the school district suspended for inappropriate actions which included racist comments and the battery.

THIS IS NOT A SECOND PROSECUTION OR TRIAL THUS

DOUBLE JEOPARDY DOES NOT APPLY

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This protection applies to the states through the Fourteenth Amendment and has been incorporated into the Nevada Constitution. See Nev. Const. art. 1, § 8, cl. 1. The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).

It has long been recognized, however, that double jeopardy "does not prohibit the imposition of any additional sanction that could, " 'in common parlance,' " be described as punishment." See Hudson, 522 U .S. at ----, 118 S.Ct. at 493 The Clause protects only against the imposition of multiple criminal punishments for the same offense." Id. at ----, 118 S.Ct. at 493. See State v. Lomas, 114 Nev. 313, 955 P.2d 678 (1998).

Double jeopardy does not prevent an employer from taking remedial action against its employee. Otherwise, a teacher could shoot and kill a principal and the school district could not suspend nor fire a teacher pending the outcome of the murder trial.

CIVIL PENALTIES ARE NOT PROSECUTIONS FOR DOUBLE JEOPARDY PURPOSES

The Nevada Supreme Court has already held that civil penalties are not prosecutions for double jeopardy purposes. In Yohey v. State, Dep't Motor Vehicles, 103 Nev. 584, 747 P.2d 238 (1987), the court held that the objective of administrative revocation of a driver's license is not to impose additional punishment, but to protect the unsuspecting public from irresponsible drivers. The Court cited State v. Parker, 335 P.2d 318 (Id. 1959), holding that

> the revocation of a driver's license or driving privilege is not a part of the penalty provided for violation of the statute. The deprivation of the driving right or privilege is for the protection of the public, and is not done for the punishment of the individual convicted.

Similarly in State v. Nichols, 819 P.2d 955 (Ariz. App. 1992) stated that even though a statute designed primarily to serve remedial purposes incidentally serves the purposes of punishment as well does not mean that the statute results in punishment for the purposes of double jeopardy. See also State v. Murray, 644 So.2d 53 (Fla. App. 4 Dist. 1994).

Further, a suspension from an employment position is not part of the criminal penalty provided for under the battery statute. Every person convicted of a misdemeanor can be punished by imprisonment in the county jail for not more than 6 months and a fine of not more than $1,000 or both or a period of community service. See NRS 193.150.

THE NEW DOUBLE JEOPARDY ANALYSIS UNDER NEVADA LAW

In Levingston v. Washoe County (1998) 114 Nev. 306, the Nevada Supreme Court reversed its prior opinion in Levingston 112 Nev. 479 (cited by counsel) and conducted an analysis of Double Jeopardy utilizing the United States Supreme Court's decision in United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

The Levingston Court held:

> [T]he Supreme Court reexamined whether a civil in rem forfeiture constitutes punishment for double jeopardy purposes and reversed the rulings of the Sixth and Ninth Circuit Courts of Appeal. Id. at 274-291, 116 S.Ct. at 2140-49. The Court applied a two-step test derived from its previous holdings addressing civil in rem forfeitures. Id. at 288, 116 S.Ct. at 2147 (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972); Various Items of Personal Property v. United States, 282 U.S. 577, 51 S.Ct. 282, 75 L.Ed. 558 (1931)).
>
> First, the two-step analysis approved in Ursery requires an examination of legislative intent to ascertain whether the forfeiture statutes were intended to be civil or criminal. Id. at 288, 116 S.Ct. at 2147. If this examination discloses a legislative intent to create civil in rem forfeiture proceedings, a presumption is established that the forfeiture is not subject to double jeopardy. Id. at 290 n. 3, 116 S.Ct. at 2148 n. 3.
>
> Second, Ursery requires an analysis of "whether the proceedings are so punitive in fact as to '[demonstrate] that the forfeiture proceeding[s] may not legitimately be viewed as civil in nature,' " despite legislative intent to the contrary. Id. at 288, 116 S.Ct. at 2147 (quoting 89 Firearms, 465 U.S. at 366, 104 S.Ct. at 1107). The "clearest proof" is required to establish that the forfeiture proceedings are so punitive in form and effect as to render them criminal despite legislative intent to the contrary. Id. at 290 & n. 3, 116 S.Ct. at 2148 & n. 3.
>
> Applying this two-step analysis, the Court determined in Ursery: (1) that the forfeiture statutes at issue were intended to establish civil in rem proceedings; and (2) that there was "little evidence, much less the 'clearest proof' " that the forfeitures were so punitive in form and effect as to render them criminal despite the contrary statutory intent. Id. at 288-291, 116 S.Ct. at 2147-49. Therefore, the Court ruled, the forfeitures and convictions at issue did not offend the Double Jeopardy Clause of the United States Constitution. Id. at 291, 116 S.Ct. at 2149.

The first step under Usery and its prodigy is to ascertain whether the legislature intended the Statute to be civil or criminal. If this examination discloses a legislative intent to create a civil proceeding, a presumption is established that the person is not subject to double jeopardy.

In 1967, Senate Bill 115 was enacted and became NRS 391.314. The Legislative History indicates that NRS 391.314 was adopted to "provide safeguards for the teachers and provide equitable procedures for supervisory controls. In the main the bill provides that educators who sign contracts are liable to suspension or revocation if they fail to fulfill their contracts. The reasons for dismissal are specifically outline, this being essential for enforcement." Mr. Butler, Secretary of the Nevada State Educators stated, "the bill will encourage a more careful and extensive evaluation of educators by the school administrators. It will also cause the districts to take a loot at their personnel policies." (Exhibit G)

The Legislative intent is that the suspension or termination is an administrative function in regards to personnel. The Legislature placed this specific statute in question under the Education and Personnel statutes and not in the criminal statutes. Although, NRS 391.314 in part deals with employees who have been charged or convicted of a criminal act, it requires a review by a superintendent and not a judge, and thus can only be an administrative function.

Moreover, as the Court noted in Hudson, 522 U.S 93, 188 S.Ct. at 496, the legislature's decision to confer authority to impose a civil sanction on an administrative agency is prima facie evidence that the legislature intended to provide for a civil sanction. Hudson, 522 U.S. at 95, 118 S.Ct. at 495. Therefore, it is clear that the Nevada legislature intended administrative proceedings relating to personnel problems to be civil and not criminal.

THE SCHOOL DISTRICT'S REMEDY IS NOT CLEARLY PUNITIVE

The Second step under Usery is that there must be the "clearest proof" that the suspension statute is so punitive in form and effect as to render them criminal despite legislative intent to the contrary. The hardest punishment that a Superintendent can provide under NRS 391.314 is to terminate the employment and as such it can hardly be said that a loss of a job is so

punitive as to render it criminal. Under the battery statute the defendant if convicted has a possible sentence of up to 6 months in the Washoe County Jail and a fine of up to $1000.00. A possible loss of income is not so punitive as to match a loss of freedom.

In U.S. v. Hudson 522 U.S. 93, 118 St. Ct. 488 (1997) the United States Supreme Court dealt with the issue of whether a penalty by an employer would prevent a criminal prosecution. In Hudson bank officers were accused of misapplication of bank funds which resulted in monetary fines and debarment by the Office of the Comptroller of Currency.

In determining that double jeopardy did not apply, the Hudson Court looked to seven factors listed in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-68, 9 L.Ed.2d 644 (1963), as "useful guideposts." Hudson, 522 U.S. at 93, 118 S.Ct. at 493. These factors include: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. Id. at 96, 118 S.Ct. at 493. The Hudson Court emphasized that these factors must be considered "in relation to the statute on its face," and "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Id., 118 S.Ct. at 493 The Court held:

> Applying traditional principles to the facts, it is clear that petitioners' criminal prosecution would not violate double jeopardy. The money penalties statutes' express designation of their sanctions as "civil," see §§ 93(b)(1) and 504(a), and the fact that the authority to issue debarment orders is conferred upon the "appropriate Federal banking agenc[ies]," see §§ 1818(e)(1)-(3), establish that Congress intended these sanctions to be civil in nature. Moreover, there is little evidence -- much less the "clearest proof" this Court requires, see Ward, 448 U.S., at 249, 100 S.Ct., at 2641-2642--to suggest that the sanctions were so punitive in form and effect as to render them criminal despite Congress' contrary intent, see United States v. Ursery, 518 U.S. 267, ----, 116 S.Ct. 2135, 2148, 135 L.Ed.2d 549. Neither sanction has historically been viewed as punishment, Helvering, supra, at 399, and n. 2,

> 400, 58 S.Ct., at 633 and n. 2, 633, and neither involves an affirmative disability or restraint, see Flemming v. Nestor, 363 U.S. 603, 617, 80 S.Ct. 1367, 1376, 4 L.Ed.2d 1435. Neither comes into play "only" on a finding of scienter, Kennedy, 372 U.S., at 168, 83 S.Ct., at 567, since penalties may be assessed under §§ 93(b) and 504, and debarment imposed under § 1818(e)(1)(C)(ii), without regard to the violator's willfulness. That the conduct for which OCC sanctions are imposed may also be criminal, see ibid., is insufficient to render the sanctions criminally punitive, Ursery, supra, at ----, 116 S.Ct., at 2148-2149, particularly in the double jeopardy context, see United States v. Dixon, 509 U.S. 688, 704, 113 S.Ct. 2849, 2860, 125 L.Ed.2d 556. Finally, although the imposition of both sanctions will deter others from emulating petitioners' conduct, see Kennedy, supra, at 168, 83 S.Ct., at 567, the mere presence of this traditional goal of criminal punishment is insufficient to render a sanction criminal, as deterrence "may serve civil as well as criminal goals," e.g., Ursery, supra, at ----, 116 S.Ct., at 2149. Pp. 495-496.

Applying the Hudson reasoning to our case, NRS 391.314 is in the Personnel chapter of the NRS not the criminal statutes. The authority to suspend is conferred upon the superintendent which establishes that the Legislature intended these sanctions to be civil in nature. And there is no evidence, much less the "clearest Proof" that the Legislature intended that the sanctions be so punitive in form and effect as to render them criminal despite its wording. The severest action a superintended can provide is to terminate an employee, which historically has not been viewed as punishment. A termination does not involve an affirmative disability nor a restraint, so it does not enter the criminal arena of punishment.

CONCLUSION

Double jeopardy does not apply as reasoned in Hudson and Usery. The Legislative intent was to provide safeguards for teachers and equitable procedures for supervisory controls. In addition, the suspension is not so punitive in form as to render it criminal. The defendant has not shown the "clearest proof" that NRS 391.314 was intended to replace the criminal statute. The State respectfully requests the Court grant this appeal and direct the Justice Court to hear the case on its merits.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

Washoe County, Nevada

By_____
Deputy District Attorney

Admissibility of Statement

CODE 2645
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_____/

OPPOSITION TO MOTIONS TO SUPPRESS EVIDENCE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, Washoe County, Deputy District Attorney, and files this OPPOSITION TO MOTIONS TO SUPPRESS EVIDENCE (hereinafter, "Opposition"). The Opposition is pursuant to the United States Constitution, the Nevada Constitution, Colorado v. Connelly, 479 U.S. 157 (1986), Oregon v. Mathiason, 429 U.S. 492 (1977), Miranda v. Arizona, 384 U.S. 436 (1966), Jackson v. Denno, 378 U.S. 368 (1964), Mitchell v. State, 114 Nev. 1417, 971 P.2d 813 (1998), State v. Taylor, 114 Nev. 1071, 968 P.2d 315 (1998), Alward v. State, 112 Nev. 141 (1996), Falcon v. State, 110 Nev. 530 (1994), Rowbottom v. State, 105 Nev. 472 (1989), Passama v. State, 103 Nev. 212 (1987), Pendleton v. State, 103 Nev. 95 (1987), Wilkins v. State, 96 Nev. 367 (1980), the attached POINTS AND AUTHORITIES incorporated herein by this reference, and the oral argument required by law at a time set by this Court.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

Statements made by a defendant to police fall into two categories: pre-*Miranda* statements and post *Miranda* statements. The statements are governed by different bodies of case law. The defendants motions address both types of statement, therefore the State of Nevada will discuss both areas of inquiry.

As a preliminary matter, the issue of the inadmissibility of a defendant's statement must be raised by the defendant. Wilkins v. State, 96 Nev. 367, 372 (1980). A hearing must be held outside the presence of the jury to determine if a statement was voluntary. Jackson v. Denno, 378 U.S. 368 (1964). The burden that the State of Nevada bears is only a showing of a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 168 (1986)(citations omitted), and Falcon v. State, 110 Nev. 530, 534 (1994).

In the seminal case of Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court required police to advise individuals of certain Constitutional rights prior to custodial

interrogation. "Custody" is defined as "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Alward v. State, 112 Nev. 141, 154 (1996)(citing California v. Beheler, 463 U.S. 1121, 1125 (1983)). When an individual is not formally arrested the inquiry is "how a reasonable man in the suspect's position would have understood his

situation." Alward, 112 Nev. at 154 (citing Berkemer v. McCarty, 468 U.S. 420 442 (1984)).

Some of the factors in this inquiry are:

> (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning.

Alward, 112 Nev. 154-55. *See also*, Taylor v. State, 114 Nev. 1071, 968 P.2d 315 (1998).

An individual who is questioned at a police station is not always in custody for the purpose of a *Miranda* analysis. In Oregon v. Mathiason, 429 U.S. 492 (1977), a suspect voluntarily met a police officer at a state patrol office. The officer informed the suspect that he was involved in the crime being investigated. The suspect made incriminating statements that were used against him at his trial. The statements in question were made without the benefit of a *Miranda* warning. The United States Supreme Court held that the statements were admissible. The Court stated:

> Such a noncustodial situation is not converted into one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. *Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.*

Id., 429 U.S. at 495 (emphasis added). *Accord*, Rowbottom v. State, 105 Nev. 472, 480 (1989). *See also,* Mitchell v. State, 114 Nev. 1417, 971 P.2d 812 (1998), wherein the Nevada Supreme Court found that a prisoner questioned in an unlocked room inside a locked prison library for two hours about a case where he was a suspect was not required to be advised of his *Miranda* rights, and the prisoners statements made during such an interview were admissible at trial.

Both the United States Supreme Court and the Nevada Supreme Court have found that the beliefs of either the suspect or the police officer regarding the issue of custody are not a valid inquiry for the *Miranda* analysis. *See*, Stansbury v. California, 511 U.S. 318, 323 (1994) and State v. Taylor, 114 Nev. 1071, ___, 968 P.2d 315, 323 (1998).

The second query to determine if *Miranda* warnings are required is whether the individual was subject to "interrogation." Interrogation has been defined by the Nevada Supreme Court as "express questioning and other acts designed to elicit incriminating statements." Pendleton v. State, 103 Nev. 95, 99 (1987)(citing Rhode Island v. Innis, 446 U.S. 291 (1980)). To trigger a *Miranda* requirement there must be both custody and interrogation.

The second area of questioning raised by the defendants motions is post *Miranda* questioning. In determining the admissibility of such statements the Court must focus on whether the waiver of rights was voluntary. The Nevada Supreme Court has held:

> In order to be voluntary, a confession must be the product of a "rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199, 208, 80 S.Ct. 274, 280, 4 L.Ed.2d 242 (1960). A confession is involuntary whether coerced by physical intimidation or psychological pressure. Townsend v. Sain, 372 U.S. 289, 307, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963).

Passama v. State, 103 Nev. 212, 213-14 (1987). The Court went on to state:

> To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226-227, 93 S.Ct. 2041, 2047-2048, 36 L.Ed.2d 854 (1973). The question in each case is whether the defendant's will was overborne when he confessed. Id., at 225-26, 93 S.Ct. at 2046-2047. Factors to be considered include: the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the
> repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep. Id., at 226, 93 S.Ct. at 2047.

Passama, 103 Nev. at 214.

The Nevada Supreme Court has held that an interrogation of four to five hours was not so egregious to overcome a voluntary waiver of rights. Alward, 112 Nev. at 156. In Rowbottom, *supra*, the Court found that a questioning session "in excess of ten hours" was not enough to make the statements elicited involuntary.

The United States Supreme Court has also found that a person suffering from delusions and allegedly hearing voices which compelled him to confess to an unsolved murder could voluntarily waive his *Miranda* rights. Connelly, *supra*. The Connelly Court specifically denied the request to "require sweeping inquiries into the state of mind of a criminal defendant who has

confessed. . . ." Id., 479 U.S. at 166-67. The Court also declined to create a "brand new constitutional right--the right of a criminal defendant to confess to his crime only when totally rational and properly motivated. . . ." Id., 479 U.S. at 166.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

A G R E E M E N T

A. INTRODUCTION

This is an agreement between the Washoe County District Attorney's Office and made with Deputy District Attorney [deputy's name] with the full knowledge and consent of [defendant's name] attorney [defendant's attorney's name]. The agreement becomes effective upon being signed by [defendant's name], his/her attorney, [defendant's attorney's name], and Deputy District Attorney [deputy's name]. There is no agreement of promise of any kind between the District Attorney's Office and [defendant's name] that is not set forth in this document.

B. CONSTITUTIONAL RIGHTS

1. I, [defendant's name], understand that I have certain constitutional rights that are set forth below.

2. I, [defendant's name], have been advised by my attorney that I do not have to answer questions or make statements of any kind; I know that I have the right to remain silent and that by entering into this agreement voluntarily, I waive my privilege against self-incrimination.

3. I, [defendant's name], also know that I have the right to have my attorney with me during all conversations with law enforcement officers or members of the District Attorney's Office; I do not give up this right as part of this agreement, but I may give it up from time to time on the advice of my attorney.

4. I, [defendant's name], waive my right to trial by jury, at which trial the State would have to prove my guilt on all elements of each charge against me beyond a reasonable doubt.

5. I, [defendant's name], waive my right to confront my accusers, that is, the right to confront and cross examine all witnesses who would testify at trial.

6. I, [defendant's name], waive my right to subpoena witnesses for trial for me.

C. PENDING CHARGES

I, [defendant's name], understand that I am currently charged in an [charging document's name] filed in [where filed], case number [case number] with [charges] each a [level of crime(s)].

D. OBLIGATIONS

1. I, [defendant's name], understand that under this agreement I am undertaking certain obligations, and I willingly and voluntarily do so.

2. I, [defendant's name], have information regarding [what the defendant will provide].

3. I, [defendant's name], agree to provide a truthful statement, responding to questions, regarding my involvement and that of all others, specifically including #, in the # that is the subject of investigation by the [agency] in their case numbered [case number].

4. I, [defendant's name], accept the duty to cooperate fully and honestly, by providing truthful information, in any investigation by the [agency] or the Washoe County District Attorney's Office concerning the [crime] that is the subject of the investigation by the [agency] in their case numbered [case number].

5. I, [defendant's name], understand that besides telling [agency] Officers and/or Deputy District Attorney's or their investigators what I know and besides a participating in the possible investigations cited above, I may be required to testify truthfully before the Washoe County Grand Jury, or in Justice Courts and/or District Courts in the State of Nevada; I agree to give such testimony and understand that I will be required to meet all deadlines established by the District Attorney's Office.

6. I, [defendant's name], understand that, overriding all else, my most important obligation is to tell the truth and to tell only the truth; always, both during the investigation and when in a court or in front of a grand jury, I am required to tell only the truth, no matter whether the questions are asked by police officers, prosecutors, investigators from the District Attorney's Office, defense attorneys, grand jurors or judges.

7. I, [defendant's name], am aware of the provisions of NRS 174.061; I understand that this agreement is void if any testimony I give pursuant to this agreement is false; I understand that

nothing in this agreement limits any testimony I give pursuant to this agreement to any predetermined formula; I understand that nothing in this agreement makes this agreement contingent on any testimony I give pursuant to this agreement contributing to a specified conclusion.

8. I [defendant's name], agree to submit to polygraph examination at the State's request and understand that this agreement is void if my responses on such test or tests are not fully truthful, as indicated by the results of the polygraph examination or examinations.

9. I, [defendant's name], understand that should I disobey any law of the United States or of the State of Nevada (except minor traffic offenses) this agreement shall be void.

E. BENEFITS

1. I, [defendant's name], expect certain benefits as a result of keeping my part of this agreement; those benefits have been explained to me by my attorney, [defendant's attorney's name]; I understand that in return for my assistance as set forth above, I am entitled only to those benefits set out below.

2. I, [defendant's name], am entitled, if I cooperate fully as outlined above, to be charged with and plead guilty to [deal]; I understand that this agreement in not binding upon the District Court judge who will impose whatever sentence that judge deems fair and appropriate within the maximum limit prescribed by NRS [applicable statute], taking due account of the gravity of the particular offense and of my character.

3. I, [defendant's name], understand that no immunity or promises of dismissal have been made to me and no offer or "deal" has been made regarding anything other than the pending criminal case against me in [court], case numbered [case number]; I understand that I am not entitled to any immunity or promises of dismissal or any charge of perjury, false swearing, contempt, or subornation of perjury arising from actions under this agreement.

F. CONCLUSION

All parties to this agreement acknowledge by their signatures they have read the agreement, understand its terms and that what is set forth above is the complete agreement

between [defendant's name], and the Washoe County District Attorney's Office and no other promises, express or implied have been made by either party.

SIGNED this _____ day of _____, .

_____
[defendant's name]

SIGNED this _____ day of _____, .

_____
[defendant's attorney]
Attorney for Defendant

SIGNED this _____ day of _____, .

_____
[deputy's name]
Deputy District Attorney

See also Ricketts v. Adamson, 107 S.Ct. 2680 (1987).

[4] The precise statutory language of NRS 174.061 requires that the written agreement "include a statement that the agreement is void if the defendant's testimony is false." As noted above, we are of the opinion that the Legislature mandated the inclusion of such invalidating language in plea agreements in order to deprive the testifying defendant of an undeserved bargain where the recipient of the bargain testifies falsely. We do not glean from the measure a legislative purpose to prejudice the defendant against whom the testimony is given. **We therefore conclude that neither the provision added by the State requiring "truthful testimony," nor the statutory provision declaring an agreement void when perverted by false testimony are to be included within the written agreement provided for a jury's inspection. In other words, our district courts have both the discretion and the obligation to excise such provisions unless admitted in response to attacks on the witness's credibility attributed to the plea agreement.**

[5] Despite our conclusion, we perceive no compelling reason to reverse Sessions' conviction on the present facts. The cautionary jury instruction given to the jury on the risks inherent in plea agreements negated any prejudicial effect the written plea agreement may have otherwise had on the minds of the jurors. Although the district court should have exercised its discretion to excise the "testify truthfully" and "void if false" language from the agreement prior to inspection by the jury, the error was harmless. See Shaw, 829 F.2d at 717-18 cautionary jury instruction rendered erroneously allowed prosecutorial vouching harmless).

890 P.2d 792, 111 Nev. 328, Sessions v. State, (Nev. 1995)
---------- Excerpt from page 890 P.2d 796.

Alibi Notice

CODE
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The State seeks to preclude the presentation of the alibi witnesses due to the defendant's failure to comply with the mandates of NRS 174.233. NRS 174.233 provides in pertinent part,

> In addition to the written notice required by NRS 174.234, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or at such other time as the court may direct, file and serve upon the prosecuting attorney a written notice of his intention to claim the alibi. The notice must contain specific information as to place at which the defendant claims to have been at the time of the alleged offense and, as particularly as known to defendant or his attorney, the names and last known addresses of the witnesses by whom he proposes to establish the alibi.

Subsection four of NRS 174.233 provides:

> If a defendant fails to file and serve a copy of the notice required by this section, the court may exclude evidence offered by the defendant to prove an alibi, except the testimony of the defendant himself. If the notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant to prove an alibi if the name and last known address of the witness, as particularly as are known to the defendant or his attorney, are not stated in the notice.

The purpose of the statute is to avoid surprise prejudice to the State in investigation of voracity of proposed alibi testimony. See Founts v. State, 87 Nev. 165, 483 P.2d 654 (1971).

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Amend Information

CODE 2490
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TO AMEND INFORMATION

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and moves this Honorable Court for an Order granting the State's request to amend the Information.

POINTS AND AUTHORITIES

STATEMENT OF FACTS
STATEMENT OF THE CASE

ARGUMENT

Amendment of the Information in this case is proper as the amendment is made before verdict, no different offense is charged and substantial rights of the defendant are not prejudiced.

NRS 173.095 provides in pertinent part:

> The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudice.

The particular acts and description of the particular acts alleged to have been committed by the accused enable him to properly defend against the charges, thus, amendment is proper. Support for the State's position is found in Green v. State, 94 Nev. 176, 576 P.2d 1123, (1978).

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Anonymous Tip

CODE
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THE DEFENDANT WAS LAWFULLY STOPPED AND DETAINED

The defendant claims that he was unlawfully detained pursuant to a citizen's complaint of erratic driving without corroboration of that driving by the Trooper. The defendant cites no pertinent Nevada cases and numerous U.S. Supreme Court cases in support of his motion. Although these cases are tangentially relevant, they do not specifically address the issue of a citizen's call on a drunk driver. However, other jurisdictions have directly ruled on this issue.

In Goodlataw v. State, 847 P.2d 589 (Alaska App. 1993), the Appellate Court held that a report of an intoxicated driver by an anonymous telephonic informant was sufficient basis for stopping the vehicle despite the fact the officer did not observe any evidence of erratic or impaired driving. In Goodlataw, the court held that a description of the vehicle and its location consistent with the officer's observation was sufficient corroboration of the informant's tip to justify the stop. (See also, Effenbeck v. State, 700 P.2d 811 (Alaska App. 1985).

Similarly, the Kansas Court of Appeals in State v. Tucker, 878 P.2d 855 (Kan. App. 1994), held that safety reasons alone may justify a Terry stop of a vehicle based upon a tip from an anonymous informant. The facts in Tucker are analogous to the case at bar. In Tucker, the arresting officer received a dispatch regarding a driver that appeared to be drunk and was running vehicles off the roadway. The dispatch was based upon an anonymous caller who gave a description of the vehicle and its direction of travel. The officer receiving this information noticed a vehicle consistent with the provided information in the described location. The officer

followed the vehicle for a short distance and did not notice any erratic driving. The officer stopped the vehicle and found the driver to be intoxicated.

The Kansas Court in reviewing this scenario reasoned that the context of the case was important. The fact that a drunken driver poses extreme danger to the public makes the exigency of such a stop paramount. The Court stated:

> This case involves ever changing equation used to balance the rights of an individual to be free from unwarranted intrusions of his or her freedom of movement and right to privacy with the right of the public to be protected from unreasonable danger. This equation and the balance change with the facts presented. It is clear that, when the focus of the stop or search is a mobile vehicle, the requirements to justify a stop or search or arrest are less. At 858.

Further, in its analysis the Kansas Court stated that the police had to have the choice of either making a stop or ignoring the anonymous tip. The Court in strong language states:

> The risk of ignoring the tip was that of death and destruction on the highway. This is not a risk which the Fourth Amendment requires the public to take. At 864.

The Oregon Court of Appeals also has held that a police officer may stop a motorist anonymously reported of being a drunk driver without first observing erratic driving. In State v. Shumway, 861 P.2d 384 (Or. App. 1993), the Oregon Court of Appeals held that a police officer may properly stop a vehicle described by an informant as being driven by a drunken driver. This stop was proper according to the Court even though the officer observed no erratic driving. The Court stated that when "reasonable suspicion is based upon a citizen informant's report, the report must contain an 'indicia of reliability'." (At 124). Moreover, the Court went on to say that when an informant, although unidentified, knowingly subjected himself to being identified, had no apparent ulterior motive, personally observed the defendant and provided a detailed description of the car and the incident, that information is reliable. This is especially true when the informant's information is corroborated by the officer when the officer finds the vehicle that matches the description at a time and location consistent with the provided information.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Arrest Probable Cause

CODE
Richard A. Gammick
#001510
P.O. Box 30083
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(775) 328-3200
Attorney for Plaintiff
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

LEGALITY OF DEFENDANT'S ARREST

NRS 171.124(1) grants authority to a peace officer to make an arrest without a warrant when the person arrested has committed a felony or gross misdemeanor, although not in his presence.[2] "Probable cause to make an arrest without a warrant exists if facts and circumstances known to the officers at the moment of the arrest would warrant a prudent man (sic) in believing that felony had been committed by person arrested." Thomas v. Sheriff, 85 Nev. 551, 553, 459 P.2d 219, 221 (1969). "Probable cause is not based on the knowledge of a specific police officer but is based on the collective knowledge of all the officers involved." Doleman v. State, 107 Nev. 409, 413-414 812 P.2d 1287, 1290 (1991), (citations omitted).

III. CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

---

3 [2] Subsection (2) also grants authority to that peace officer: "He may also, at night, without a warrant arrest any person whom he has reasonable cause for believing to have committed a felony or gross misdemeanor, and is justified in making the arrest, thought it afterward appear that a felony or gross misdemeanor has not been committed."

Arrest Warrantless Hot Pursuit

CODE
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

A. Trooper did not need a warrant to arrest the Defendant, nor did he need a warrant to enter the Defendant's garage in order to arrest the Defendant based on U.S. v. Santana.

A warrant to arrest the Defendant was not necessary under NRS 171.136, which allows an officer to arrest an individual, without a warrant, if the offense committed is a misdemeanor and it is committed in the arresting officer's presence[3]. In this case, the Trooper initiated the stop due to the fact he witnessed the Defendant tailgating a Harley Davidson motorcycle on northbound U.S. 395. Tailgating or following too closely is a violation of NRS 484.307. All traffic offenses in Nevada are misdemeanors pursuant to NRS 193.170. Therefore, Trooper O'Rourke had probable cause to stop and arrest the Defendant without a warrant because she was committing a misdemeanor, following too closely,; in a public place, on public highway U.S. 395,; while in his presence, the Trooper personally observed the violation.

The next logical question in the analysis is whether the Defendant can avoid being arrested without a warrant by escaping into her garage. The Supreme Court of the United States in United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406 (1976) squarely addressed this issue and concluded a defendant could not thwart an otherwise lawful arrest that had been set in motion in a public place by retreating into her home. Santana 427 *U.S.* at 43.

In Santana, the police had probable cause to believe the Defendant participated in a drug transaction with an undercover officer. Id. at 40-42. The defendant was standing in the doorway of her house when the police pulled up to the residence, approximately 15 feet from the defendant. Id. The police exited their vehicles while shouting, "police" and displaying their

[3] A warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820 (1976).

badges. Id. Upon seeing the officers, the defendant retreated into her home. Id. The police followed the defendant inside the home and arrested her. Id.

The Supreme Court concluded the police initially decided to arrest the defendant while she was standing in the doorway and that by standing in the doorway she was in a public place. Id. **"We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *Watson*, by the expedient of escaping to a private place."** *Id.* at 43 (emphasis added). The Court ruled the officers entry into the home without a warrant did not violate the Fourth Amendment.

The rule announced in *Santana*, is dispositive of the issue in this case.

The Defendant states in his motion, "The court stated that it would be hard to ever justify warrantless police entry into a home unless a serious crime is involved. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091(1984)." However, the Defendant failed to recognize the Court in *Welsh* listed the "few in number and carefully delineated" exceptions to the warrant requirement, which specifically included its opinion in Santana. Welsh 466 U.S. at 465.

Thus, under the Supreme Court rule announced in Santana, Trooper , acted properly and did not violate the Defendant's Fourth Amendment rights.

B. The Supreme Court Rule announced in Santana applies equally to misdemeanors and felonies.

The rule announced by the Supreme Court in Santana, logically applies to misdemeanors and felonies alike. An arrest which has been set in motion in a public place, cannot be defeated by the defendant retreating to a private place. Santana at 43. While the defendant in Santana was suspected of committing a felony offense when arrested, the Supreme Court did not limit its holding only to felonies. Neither the seriousness of the crime nor how the crime was classified entered into the Court's analysis in finding a defendant cannot use his house to shield an otherwise proper arrest. The courts which have addressed this issue weigh heavily against interpreting Santana to apply only to felonies, including the Nevada Supreme Court. In

Edwards v. State, 107 Nev. 150, 808 P.2d 528 (1991), the Nevada Supreme Court applied the rule in Santana to a case involving a gross misdemeanor. California has expressly ruled Santana applies to misdemeanors. *People v. Lloyd,* 216 Cal.App.3d 1425, 265 Cal.Rptr.2d. 422 (1989); In re Lavoyne M., 221 Cal.App.3d. 154, 270 Cal.Rptr.2d. 394 (1990). The Ninth Circuit Court of Appeal also applied Santana to case involving a misdemeanor. *United States v. Patch*, 114 F.3d 131 (C.A.9 (Ariz.) 1997).

C. Trooper warrantless entry into the Defendant's garage and subsequent arrest of the Defendant is lawful under the "hot pursuit" and exigent circumstances exceptions to the Fourth Amendment warrant requirement.

The State recognizes that the Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment prohibits police from making warrantless and nonconsensual entry into a defendant's home in order to make routine felony arrests. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980). The Supreme Court through a series of decisions have laid out "exigent circumstance" exceptions which can justify a warrantless entry into a defendant's home and thus not violate the Fourth Amendment warrant requirement.

Preventing the destruction of evidence[4] and hot pursuit[5] are the two exigent circumstances exceptions which apply to the facts of this case.

Hot pursuit is defined as, "some sort of chase, but which need not be an extended hue and cry in and about the public streets." Santana at 42,43. The Defendant in this case led Trooper O'Rourke on a two to three mile chase in and about the public streets of Washoe County. Thus the Trooper was in hot pursuit of the Defendant when he entered her garage and his conduct falls within the hot pursuit exception excusing the Fourth Amendment warrant requirement.

---

[4] See *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826 (1966).

[5] See *Warden v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642 (1976).

The Defendant contends the hot pursuit exception does not apply to misdemeanors and cites Welsh. However Welsh is distinguishable from the facts in this case. First the Court in *Welsh* refused to analyze the case under the hot pursuit exception because Wisconsin categorized the offense committed as a civil or minor offense. The Court in Welsh, reasoned a finding of exigent circumstances sufficient to justify a warrantless entry into a person's residence should be strictly limited when only a minor offense was committed. Welsh 466 U.S. at 750. In analyzing whether an offense was minor the Court looked to the potential sentence a person could receive for that offense. Id. at 754. The offense committed by defendant in Welsh, the Court concluded was minor and civil in nature because the defendant could not receive any jail time and could only receive a $200 fine. *Id.* However, the offenses committed in this case, following too close[6] and driving under the influence[7] are both criminal offenses for which a person may serve up to six months in the Washoe County Jail.

Additionally, the Court determined there was not a true hot pursuit in Welsh because there was no immediate or continuous pursuit of the defendant from the scene of the crime. *Id.* at 753. The same conclusion cannot be reached on the facts of this case, since the Trooper followed directly behind the Defendant with his emergency lights and sirens activated continuously for more than two miles over four different public roads.

The Defendant in this case is charged with three counts of driving under the influence of alcohol, (hereafter DUI). In proving a DUI case, one of the many pieces of evidence the State relies on is the result of the defendant's evidentiary blood or breath test which indicates the alcohol content of the defendant's blood or breath. From the time alcohol is consumed the human body is working to break down the substance and expel it from the body. It is logical to infer that once the Defendant stopped her vehicle and had contact with the Trooper he would have probable cause to arrest her for DUI, which is what happened in this case. Probable cause

[6] NRS 193.170 & 193.120.

[7] NRS 484.379 & 484.3792.

would be based on her physical signs of intoxication, performance on the field sobriety tests and driving pattern. After the arrest she would be required under 484.383 to submit to an evidentiary test to measure the alcohol content of her blood or breath. Thus any delay in arresting the Defendant would allow her body to break down the alcohol and result in the destruction of evidence.

CONCLUSION

Articuable Suspicion Terry & NRS 171.123

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION FOR SANBORN INSTRUCTION

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and JOHN W. HELZER, Assistant District Attorney, to submit this "Opposition To Motion For Sanborn Instruction." The State's opposition is set forth in the accompanying Discussion.

DISCUSSION

In further support that the requests of the defendant are unfocused and premature, the State would refer to the authority cited by counsel for the defendant. This authority focuses almost exclusively on statutory presumptions and the case of Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

The consideration of instructing a jury on a presumption is an involved process and should occur only after the evidence has been fully developed. Any request that a

presumption be set forth in an instruction must be specific. Additionally, that request will necessarily involve an in-depth analysis by the Court. In support that this process must be specific and requires an in-depth analysis, are NRS 47.180 (Presumptions generally: Effect; direct evidence.), NRS 47.190 (Determination of evidence of basic facts.), NRS 47.200 (Determination on evidence of presumed fact: Where basic facts established.), NRS 47.210 (Determination on evidence of presumed fact: Where basic facts lacking.), NRS 47.220 (Determination on evidence of presumed fact: Where basic facts doubtful.), NRS 47.230 (Presumptions against accused in criminal actions). Juries must not be instructed in the general overly broad manner that defense requests. The defendant must make a request that is specific, and the Court must make findings as to that specific request. In addition to the statutes previously referred to, the Sanborn decision relied on by the defendant supports the requirement of specificity.

In Sanborn the Court specifically found that the State's mishandling of a gun resulted in a loss of evidence of blood and fingerprints. With the loss of this evidence, the defendant's claim of self-defense rested almost exclusively on his own testimony. The Court found that if the defendant's testimony was true, the evidence of the blood and fingerprints on the weapon could have been critical corroboration of the claim of self-defense. The Court further found that the State's case was enhanced by the absence of any blood or fingerprint evidence. After these specific findings, the Court held that the State could not benefit from its failure to preserve this evidence. It was after these very specific findings were made that the Court proceeded to indicate what instruction would be given.

Sanborn does not support the general unspecified request now made by the defendant. The proposed instruction was very narrowly drafted and was only ordered after there was a specific showing of a critical need for the evidence by the defendant and a finding that the State benefitted from its actions resulting in a loss of that evidence. Sanborn did not result in the creation of generally accepted instruction.

For the reasons set forth above, the State would respectfully submit that the Court delay any decision concerning the requested instruction until after the presentation of evidence in the case is concluded. The State would further request that prior to making any determination about the requested instruction that the process set forth in Chapter 47 of the Nevada Revised Statutes and in the Sanborn decision take place. Finally, the State would request that if, after a focused hearing, there is determined to be justification for an instruction concerning any evidence presented, that the instruction be drafted in a manner consistent with the specificity set forth in the Nevada Revised Statutes and the Sanborn decision.

Respectfully submitted this ____ day of May,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

05191263

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing at Reno, Washoe County, Nevada, a true copy of the foregoing document, addressed to:

JoNELL THOMAS, ESQ
STATE BAR NO. 4771
302 EAST CARSON AVE., 3RD FLOOR
LAS VEGAS, NV 89101

ROBERT LANGFORD, ESQ.
STATE BAR NO. 3988
WALTON & LANGFORD
550 EAST CHARLESTON BLVD., #A
LAS VEGAS, NV 89104

DATED this ____ day of _____, 2000.

Automobile Search Full Discussion

CODE 2645
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendants.

_____/

OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, Washoe County District Attorney, and , Deputy District Attorney, and hereby files its Opposition to Defendant's Motion to Suppress; and Memorandum of Points and Authorities in support thereof. Said Opposition is made and based upon the following Points and Authorities, the exhibit(s) attached thereto and all pleadings and papers on file herein.

POINTS AND AUTHORITIES

STATEMENT OF THE CASE
STATEMENT OF FACTS
ARGUMENT

The Stop Made By Officers Was Lawful And Proper Since They Had A Reasonable Suspicion, If Not Probable Cause, To Believe That Criminal Activity Was Afoot.

NRS 171.123(1) provides that "[a]ny peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime."

In Nevada, a pretextual traffic stop is of no consequence so long has a police officer has a valid reason to stop a vehicle. See Gama v. State, 112 Nev. 833, 920 P.2d 1010 (Nev. 1996). Even if officers have prior knowledge of drug activity, a pretextual stop under Nevada and federal law is permitted. Thus, a police officer may stop a vehicle based on articulable reasonable suspicion or probable cause, even if the police officer has an intent or motive to search a vehicle for contraband or evidence. Id.[8]

The Evidence Located By Officers Must Not Be Suppressed Since It Was Obtained Due To A Lawful Inventory Search.

It is well-established that police officers need not comply with the Fourth Amendment's probable cause and warrant requirements when they are conducting an inventory search of an automobile in order to further some legitimate caretaking function.[9] Weintraub v.

---

[8] It is interesting that ROSS mentions Gama, supra, in a footnote in her Motion to Suppress when Gama, supra, is the controlling law in Nevada regarding reasonable suspicion or probable cause to stop a vehicle. ROSS, instead, cites Alejandre v. State, 111 Nev. 1253, 903 P.2d 805 (Nev. 1995), which was overruled in Gama, supra.

[9] The inventory search exception to the warrant requirement is premised on an individual's diminished expectation of privacy in an automobile and three important

State, 110 Nev. 287, 871 P.2d 339, 340 (Nev. 1994) (citing South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976)). The inventory search must be carried out pursuant to standardized official department procedures and must be administered in good faith in order to pass constitutional muster. Id. (citing Colorado v. Bertine, 479 U.S. 367, 374, 107 S.Ct. 738, 742 (1987)).

The Supreme Court has held that a police officer must produce an actual inventory when she or he conducts an inventory search. Id. (citing State v. Greenwald, 109 Nev. 808, 858 P.2d 36 (Nev. 1993)); see also Florida v. Wells, 495 U.S. 1, 4, 110 S.Ct. 1632, 1635 (1990).

In Wells, supra, 495 U.S., at 4, 110 S.Ct. 1635, the United States Supreme Court stated as follows:

> . . . an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory [citations omitted]. A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself. Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors.

In Greenwald, supra, the Supreme Court held that the inventory search of a motorcycle conducted by an officer was unlawful since it was too exacting of a search, including examining the contents of the gas and oil tanks, dismantling a flashlight, searching all the

---

> governmental interests in inventorying an automobile: to protect an owner's property while the automobile is in police custody, to ensure against claims of lost, stolen, or damaged property, and to guard the police from danger. United States v. Lomeli, 76 F.3d 146, 148 (7th Cir. 1996) . . . But the fact that an inventory search may also have had an investigatory motive does not invalidate it. Id.

pockets of all the clothing found on the motorcycle and a complete internal inspection of the buckled saddlebags affixed to the motorcycle. Furthermore, the officer's inventory list failed to include many of the items located during the search; hence, the Supreme Court held that the inventory search was actually an unlawful search for evidence.

In Rice v. State, 113 Nev. 425, 936 P.2d 319 (Nev. 1997), the Supreme Court held that the inventory search of the defendant's backpack after he was arrested was unlawful. The officers in this case testified that they were looking for contraband when they searched the backpack. Furthermore, the record did not indicate that a formal inventory was prepared at the time of arrest.

Even If The Court Finds That The Inventory Search Was Not According to UNRPD Policy And Procedure, The Evidence Would Have Been Inevitably Discovered Due To The Necessity Of Conducting An Inventory Of The Mazda; Hence, The Evidence Must Not Be Suppressed.

The inevitable discovery exception applies when, at the time of the unlawful search, there was a separate independent line of investigation underway, or there are compelling facts indicating, that the disputed evidence would have inevitably been discovered, such as proof that the evidence would have been found in an inventory search that would inevitably follow seizure of a car. United States v. Kennedy, 61 F.3d 494, 498 (6th Cir. 1995). See also Clough v. State, 92 Nev. 603, 604-05, 555 P.2d 840, 841 (Nev. 1976); Carlisle v. State, 98 Nev. 128, 129-30, 642 P.2d 596, 597-98 (Nev. 1982).

The reason the Supreme Court in Greenwald, supra, and Rice, supra, found inventory searches to be improper is because facts were present indicating that officers were actually using the inventory search as a ruse for searching for evidence and contraband. Clearly, the Supreme Court disapproves of officers rummaging through a suspect's belongings through the guise of an inventory search.

The Evidence Located By Officers Must Not Be Suppressed Since It Was Obtained Due To A Lawful Search Incident To Arrest.

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification. New York v. Belton, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864 (1981) (citing United States v. Robinson 414 U.S. 218, 235, 94 S.Ct. 467, 476 (1973)).

In Belton, supra, 453 U.S. 454, 101 S.Ct. 2860 (citing and quoting Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040 (1969)), the United States Supreme Court stated:

> "Articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'"
>
> The United States Supreme Court held that:
> When a police officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident to arrest, search the passenger compartment of that automobile. Id. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so close will containers in it be within his reach. Id.

The Nevada Supreme Court has held, in order to search an automobile based on the "automobile exception" to the warrant requirement, a police officer must have probable cause to believe that criminal evidence is located inside an automobile, and must demonstrate exigent circumstances sufficient to dispense with the need for a warrant. State v. Harnisch, 113 Nev. 214, 931 P.2d 1359 (Nev. 1997); reh'g granted State v. Harnisch, 114 Nev. 225, 954 P.2d 1180 (Nev. 1998). See also Barrios-Lomeli, 113 Nev. 952, 944 P.2d 791 (Nev. 1997).

The case at hand, however, does not concern the "automobile exception," since at issue is whether officers seized the evidence incident to a lawful arrest. In Harnisch, supra, the Supreme Court did not find there to be a search incident to lawful arrest since such a search is limited to the passenger compartment of an automobile, and the evidence in that case was found inside the trunk.

In State v. Greenwald, 109 Nev. 808, 810, 858 P.2d 36, 37 (Nev. 1993), the Nevada Supreme Court stated "the authority to search incident to arrest derives from the need to disarm and prevent any evidence from being concealed or destroyed." Hence, the Supreme Court did not consider the prosecution's argument that a valid search incident to arrest occurred since the defendant "was locked away in a police car, and there was no conceivable 'need' to disarm him or prevent him from concealing or destroying evidence."[10]

The facts in the case at hand are starkly distinct from the facts in Greenwald, supra. In Greenwald, supra, the Supreme Court decided that the search of the motorcycle was not justified since the defendant was locked up in the police vehicle, and the search was made some time after the defendant's arrest. However, it is clear that the Supreme Court based its decision on its disapproval of the officer's blatant search of the motorcycle without a reasonable justification. Significantly, a motorcycle does not contain a passenger compartment similar to an automobile. In fact, the search in Greenwald, supra, is more analogous to the search of a bag or backpack found on or near a suspect's person incident to arrest. See Rice v. State, 113 Nev. 425, 936 P.2d 319 (Nev. 1997).

In Rice, supra, 113 Nev. 425, 936 P.2d 319 (Nev. 1997), the Supreme Court found that a search incident to arrest of the defendant's backpack was improper. In Rice, supra, the defendant was arrested and his backpack was left outside of the police vehicle.

The facts in the case at hand are distinct from the facts in Rice, supra, insofar as Rice did not involve an automobile. The defendant in Rice was under arrest and had dropped his backpack. The police had not seen the defendant's hands inside the backpack, nor were there any

[10] In Greenwald, supra, the defendant was stopped riding a motorcycle. After the officer locked the defendant inside a patrol vehicle, the officer proceeded to search every component of the motorcycle, including the saddlebag, gas and oil tanks and a flashlight. The Supreme Court also rejected the prosecution's argument that a valid inventory search was conducted.

other people with the defendant when he was arrested. The police could have taken the backpack to the police station, booked it in evidence, and conducted a routine inventory search of the backpack.[11] However, the officer testified that he searched the backpack for the purpose of finding additional contraband.

Greenwald, supra, and Rice, supra, did not deal with the search of an automobile incident to lawful arrest. Clearly, Belton, supra, 453 U.S. 454, 101 S.Ct. 2860, held that officers may search the inside of an automobile, and containers located therein, due to a lawful arrest. Hence, the precedent set forth by the United States Supreme Court in Belton, supra, applies to this case. Thus, the search of the bag was lawful, the evidence was lawfully obtained and ROSS' Motion to Suppress must be denied.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

[11] The Supreme Court seems to be sending a message to law enforcement that it will only acknowledge searches incident to a valid arrest that are justified, and not used merely to search property without a warrant.

Bail Pending Appeal

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

It is well settled that a convicted person has no constitutional right to bail pending appeal. In Re Austin, 86 Nev. 798, 801 (1970).

> We are of the opinion that the constitution, in declaring bail to be a matter of right, contemplated only those cases in which the guilt of the party had not been already judicially ascertained; cases in which the prisoner as yet stood upon his plea of not guilty, supported with all the presumptions of innocence with which the law delights to surround him. But when his trial has been had, and his plea proven false, the law will not stultify itself by presuming him other than that it has itself adjudged him to be. If the constitution, indeed, intended to introduce the rule of absolute right to bail, as well after as before conviction of such felonies, it would result that no convict could be punished for his ascertained crime if he had either wealth or friends; for no mere pecuniary considerations could weigh against the alternative of a degrading imprisonment, at hard labor, for a crime involving moral turpitude. It would operate in practice as a mere money commutation for the infamous corporal punishment which the law has denounced against the perpetration of crime. State v. McFarlin, 41 Nev. 105, 107 (1917), quoting from Ex parte Voll, 41 Cal. 29.

NRS 178.488 permits bail pending appeal unless it shall appear that the appeal is frivolous or taken for delay. If the appeal has merit and is not taken for delay, the Court may then exercise its discretion in deciding whether bail shall be permitted.

If this Court should find that defendant's appeal is not frivolous or taken for delay (NRS 178.488) and that defendant does not pose a risk of flight or danger to the community (In Re Austin, supra), it may then impose a reasonable bail amount pending appeal, taking into account a number of factors.

It must first be remembered that defendant has been lawfully convicted and sentenced to a lengthy prison term. Thus, any risk of flight is greatly enhanced. The probable cause or merit of her appeal is marginal at best.

CONCLUSION

Bail Reduction

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE TO MOTION FOR BAIL REDUCTION

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NRS 178.498 sets out the legal bases for setting an appropriate bail. That statute states that bail should be set based on:

1. The nature and circumstances of the offense charged;

2. The financial ability of the defendant to give bail;

3. The character of the defendant;

4. The factors listed in NRS 178.4853/

The State believes that the bail in this case is bondable. The offenses charged are serious, violent felonies. They involve violent acts against the estranged wife of the defendant and his estranged wife's boyfriend. The maximum potential punishments for these offenses reflect their seriousness.

The State assumes that the defendant lacks the financial ability to raise and give bail. He has been in confinement since the crimes took place on .

Based on this discussion, the State respectfully contends that the defendant has exhibited a violent nature making him a clear threat to the safety of the victim and society in general. Therefore, the State respectfully requests that this Honorable Court deny the defendant's Motion.

Additionally, NRS 178.498 incorporates by reference the provisions of NRS 178.4853. The State will address the following factors of that latter statute:

1. ...;

2. ...;

3. His relationships with his spouse,...;

4. His reputation, character, and mental condition;

5. His prior criminal record,...;

6. ...;

7. The nature of the offenses with which he is charged, the apparent probability of conviction, and the likely sentence, insofar as these factors relate to the risk of his not appearing;

8. The nature and seriousness of the danger posed to the alleged victim, any other person or the community that would be posed by the person's release;

9. The likelihood of more criminal activity by him after he is released; and

10. ....

relationship with his wife is extremely poor.

IV. CONCLUSION

Based on the legal discussion herein above, the State respectfully requests that this Honorable Court deny the defendant's Motion to Reduce Bail.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Battered Woman's Syndrome

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

I. EVIDENCE OF BATTERED WOMAN'S SYNDROME IS CRITICAL AND RELEVANT TO THE PROSECUTION OF THIS CASE.

Domestic Battery and Stalking is a crime of power and control. Since the victim's response to the defendant's power and control is rooted in the cycle of violence, expert witness testimony is necessary to explain to the jury what the cycle of violence is and how power and control behaviors evolve and manifest.

Most juries do not understand why battered women stay with their abusers for so long. Nor does a lay person intuitively conclude that the danger of an assaultive episode increases when the victim tries to leave or does leave the batterer.

The introduction of expert witness testimony describing the lives of battered women has a far larger application in the prosecution of crimes than only cases involving actual physical violence. While most discussions of the use of battered women's syndrome focus on the introduction of this evidence in defense of a battered woman accused of killing her abuser, this brief urges the expanded use of such evidence. Because power and control behaviors created by the cycle embrace other criminal acts, prosecutions arising out of the cycle's power and control behaviors will ultimately save lives, and prevent domestic violence.

The Nevada Legislature has not addressed the issue of whether or not evidence of the Battered Women's Syndrome (hereinafter referred to as "BWS") should be admitted except as

defense evidence. They have followed California's model in the prosecution of such crimes, implementing "no drop" policies, and pursuing such prosecutions despite the victim's objections.

Additionally, the Nevada Supreme Court has declined to comment on BWS as a defense in this State. *(Larson v. State,* 104 Nev. 691, 766 P.2d. 261 (1988). However, in footnote five in the *Larson* case the Nevada Supreme Court noted the jurisdictions at that time who have addressed the issue and have either embraced BWS as a defense or not. The Court said,

> The Kansas Supreme Court recently determined that a self-defense instruction is improper in a case in which a battered woman kills her sleeping spouse. *State v. Stewart,* 763 P.2d 572 (Kan.1988). However, at least two other jurisdictions have held that an abused spouse who kills her sleeping husband is entitled to a jury instruction on the battered spouse self-defense theory. See *State v. Norman*, 89 N.C.App. 384, 366 S.E.2d 586, appeal pending 322 N.C. 484, 370 S.E.2d 233 (N.C.1988); *State v. Leidholm*, 334 N.W.2d 811 (N.D.1983).

In 1993, however, the Nevada Legislature codified the use of BWS by a defendant (NRS 48.061). to assist in the presentation of a self-defense argument. It states,

> Evidence of domestic violence as defined in 33.018 and expert testimony concerning the effect of domestic violence on the beliefs, behavior and perception of the person alleging the domestic violence is admissible in chief and in rebuttal, when determining:
>
> 1. Whether a person is excepted from criminal liability pursuant to subsection 7 of NRS 194.010, to show the state of mind of the defendant.
>
> 2. Whether a person in accordance with NRS 200.200 has killed another in self-defense, toward the establishment of the legal defense.

However, California codified a broader evidentiary basis for the admission of BWS evidence pursuant to California Evidence Code Section 1107.

> The pertinent text of Cal.Evid.Code 1107 states:
> (a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome,
>
> including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis for the criminal charge.

> (b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven.
>
> (c) For the purposes of this section, "abuse" and "domestic violence" are defined as provided in Section 542 of the Code of Civil Procedure for the purposes of the Domestic Violence Protection Act.

The logic behind admitting BWS for a broader purpose in California began with the admission of "Rape Trauma Syndrome". The California Legislature recognized the necessity of educating juries. The goal was to disabuse the jury of some widely held misconceptions about rape and rape victims. Courts ruled evidence of Rape Trauma Syndrome was admissible for the purpose of educating the jury, leaving them free to evaluate evidence free of the constraints of popular myths. Because "post rape" behavior is not often consistent with society's general expectations, the court stated that the jury may require explanations by experts in sexual assault cases to fully evaluate the evidence before it.

Examples of actions inconsistent with popular stereotypes include a delay in reporting, *inconsistent post-incident statements*, and the victim's brief return to the scene of the attack to retrieve her belongings.

///

///

The California Supreme Court in *People v. Bledsoe*, 36 Cal.3d 236, 681 P.2d 291 (Cal. 1984) permitted the introduction of expert testimony in order to assist the trier of fact in determining the credibility of the victim free of misconceptions about presumed behavior of rape victims. The court specifically exempted prosecutors from arguing that rape trauma syndrome was admissible to prove a rape occurred. The only ground for admissibility is to provide the jury with new information beyond the commonly held assumptions about crime victims and their expected behaviors. The expert is not permitted to testify that the victim suffers from the syndrome, or that the defendant committed the crime. The expert is not permitted to state that the behavior of any

person is consistent with the syndrome. The only permissible testimony is information about the syndrome itself, common behaviors of the victims and offenders, in order to disabuse juries of existing myths on the subject.

> Nevada's NRS 50.345, which states:
> In any prosecution for sexual assault, expert testimony is not inadmissible to show that the victim's behavior or mental or physical condition *is consistent* with the behavior or condition of a victim of sexual assault.

Similarly, the California Courts permit experts to offer evidence that the victim's behavior or mental or physical condition *is consistent with* the behavior or condition of being a victim of sexual assault. Additionally, in any criminal action in California, expert testimony is admissible by either the prosecution or the defense regarding BWS including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence. Other courts have upheld the use of this type of evidence. *U.S. v. Hadley*, 918 F.2d 848,(C.A.9 (Ariz.) 1990)

In *People v. Aris*, 215 Cal.App.3d 1178, (1989), BWS was admitted for the limited purpose of assisting juries to evaluate the defendant's reasonable fear causing her to act in "self-defense." Nevada has followed this use of BWS in adoption of NRS 48.061 (see infra).

Subsequently, the State of California enacted a nationwide approach to cases involving domestic violence. The prosecutors and law enforcement agencies enacted "no-drop" policies based on belief that prosecution of such cases afford the greatest protection to the victim of domestic violence, despite her insistence that charges be dropped, and despite the fact that she actively resist prosecution of the case.

As a result of such policies, cases frequently were prosecuted involving battered women as crime victims *who at the time of trial refused to testify against their partners, minimized the level of violence used by their partner, minimized their fear, or failed to appear for trial.* This presented a dilemma for the State's prosecutors, who struggled with the unmanageability caused by

filing domestic violence cases with victims who actively resisted prosecution of their abusing, controlling partners.

The California Legislature responded with a statute permitting limited admissibility of evidence of the syndrome. Under Evidence Code 1107, courts permit the consideration of such evidence only after a hearing outside the presence of the jury to determine whether such evidence meets several tests.

The first test is actual utility of such evidence for the trier of fact. The second test is admissibility. The third is relevance. Finally, the final test is whether the expert offered is actually competent to testify to the syndrome and its behaviors.

Should the judge rule favorably toward the prosecution on all these grounds, the judge still makes an evaluation of whether such evidence is more probative than prejudicial pursuant to Cal.Evid.Code Section 352 which is California's equivalent to NRS 48.035.

Expert testimony is admissible in Nevada if "...scientific, technical or otherwise specialized knowledge will assist the trier of fact to understand the evidence, or to determine a fact in issue." (NRS 50.275) The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission. The policy in Nevada is to permit juries broad access to expert testimony.

UNDERSTANDING THE BATTERER'S BEHAVIOR

In addition to explaining the behavior of the victim of crime, courts permit general perpetrator profile testimony. *People v. McAlpin*, 53 Cal.3d 1289, 1301, 812 P.2d 563, 570 (Cal 1991). Expert testimony is necessary to explain the motivations and personality characteristics of batterers and stalkers as well. This is because often a defendant admits evidence of his good relationship with the victim as evidence that he would not have caused fear or done harm to the victim. "The defendant is a good provider". Expert testimony on the dynamics of power and

control based relationships, in which the batterer both nurtures and abuses his victim, thus becomes necessary to disabuse the jury of the popular myth which is the foundation of the defendant's argument.

IV. QUALIFICATION OF THE EXPERT

The expert's qualifications arise from greater experiences with battered women than an average person. Any person possessed or specialized knowledge, skill, experience, training, or education about BWS qualifies as an expert. The State's witness, Jerry Nims, Ph.D., a psychologist licensed to practice in Nevada possesses such qualifications.

V. LIMITING JURY INSTRUCTIONS MUST BE GIVEN IN CONJUNCTION WITH EXPERT TESTIMONY ON BATTERED WOMEN'S SYNDROME

The State proposes the following jury instruction (based on CALJIC 9.35.1):

Proposed Jury Instruction

> Evidence has been presented to you concerning battered women's syndrome. This evidence is not received and must not be considered by you to prove the occurrence of the act or acts of abuse which form the basis of the crime(s) charged.
>
> Battered women's syndrome research is based upon an approach that is completely different from that which you must take to this case. The syndrome research begins with the assumption that physical abuse has occurred, and seeks to describe and explain common reactions of women to that experience. As distinguished from that research approach, you are to presume the defendant innocent. The State has the burden of proving the defendant guilty beyond a reasonable doubt.
>
> Thus, you may only consider the evidence concerning Battered Women's Syndrome and it's effect for the limited purpose of showing, if it does, that the alleged victim's reactions, as demonstrated by the evidence, are not inconsistent with the beliefs, perceptions, or behavior of victims of domestic violence.

VI. CONCLUSION

A trial is a search for truth. The rules of evidence are designed to further this search. The jury cannot understand the dynamics of these battering and stalking behaviors unless they can

see beyond prevalent myths and expectations. Therefore, the State requests the court permit introduction of BWS testimony for the

limited purpose of explaining these dynamics and that the victim's post accusation behaviors (ie., minimization and perception of financial dependence)are consistent with that syndrome.

Battery Domestic Priors

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE TO MOTION TO STRIKE PRIOR CONVICTIONS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and submits the State's Response to Motion to Strike Prior Convictions.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

THE DEFENDANT'S PRIOR CONVICTIONS SHOULD RIGHTFULLY BE USED TO ELEVATE DEFENDANT'S CRIME TO A FELONY

The plain and unambiguous language in Section 18 of the bill explains which offenses are subject to the changes in the law now enacted as NRS 200.485. The bill specifies that any domestic battery thus enhanced must occur after January 1, 1998. The bill declares new penalties for recidivists who continue to batter, and gives offenders notice of the enhanced penalties they will face. The word offense {"for the first offense within the immediately preceding seven years." [AB 170, Section 18, subdivision 1(a)] "for the second offense within the immediately preceding seven years." [AB 170, Section 18, subdivision 2(b)] "for a third offense within the immediately preceding seven years. [AB 170, Section 18, subdivision 2(c)]}" means the actual crime itself. The degree of punishment attached to the commission of the crime is dependent on the number of defendant's prior convictions for domestic battery occurring within the seven years previous to the new offense. Clearly, the law intended to increase punishment for recidivists committing new domestic batteries. The washout period for priors used to enhance punishment for new offenses, is specified as seven years. The actual punishment is predicated on how many prior batteries occurred within the immediately preceding seven years.

The clear, unambiguous wording of the law itself, which has been in effect since January 1, 1998 is inconsistent with the defense argument that the word "offenses" refers to prior convictions as well as batteries punished under the new law. The legislature clearly meant to enhance punishment for recidivists.

II

THE LAW IS INTENDED TO PUNISH RECIDIVISTS MORE HARSHLY THAN BEFORE

Further evidence of the legislative intent's to punish repeat offenders whose prior convictions occur prior to January 1, 1998 can be found in Section 1 of AB 170:

> 1. There is a critical public need to insure the effective prosecution of persons who commit acts of domestic violence in this state.
>
> 2. The laws of this state require amendment to improve the prosecution of crimes involving domestic violence.
>
> 3. The high recidivism rate for the crimes of battery, sexual assault, and stalking when committed against the spouse, child or relative of the offender or other person who the offender or other person is or was dating indicates that alternative sentencing procedures for such crimes are necessary.

Given the legislature's concerns about domestic violence, the more reasonable interpretation of Section 32 of AB 170 is that the enhancement process does not take effect until January 1, 1998, but after that time, any applicable prior conviction, regardless of when it occurred, may be used to enhance a third conviction for domestic battery to a felony. Obviously, if the contrary was true, abusive spouse are free of felony status and punishment until they commit three additional acts of domestic violence offenses after January 1, 1998. Compare Polson v. State, 108 Nev. 1044, 1047, 843 P.2d 825 (1992) - "an ambiguous statute can be construed in line with what reason and public policy would indicate the legislature intended." Also, see People v. Jackson, 37 Cal.3d 826, 833, 694 P.2d 736 (Cal. 1985)-"the basic purpose of this section...the deterrents of recidivism ...would be frustrated by a construction which did not take account of prior criminal conduct."

III

THE LAW DOES NOT ESTABLISH A NEW OFFENSE

Further evidence of the legislature's intent is that NRS 200.485 does not establish a new offense; it merely increases the penalty for additional convictions. Thus, as of January 1, 1998, our legislature put defendants on notice of the precise penalty they risk when they choose to commit a new act of domestic battery. Accord State v. Hall, 895 P.2d 229, 232 (N.M.App. 1995)- since the defendant's actions occurred six months after the new DUI statute was enacted, he had "fair warning" that if he committed a new DUI, his previous convictions could be used to enhance his sentence.

Counsel argues that the language in Section 32 ("Sections 18 and 19 of this act do not apply to offenses that are committed before January 1, 1998") is intended to bar use of prior convictions. Instead, the language protects against any retroactive felony enhancement of misdemeanor batteries committed prior to January 1, 1998 by operation of law. To fail to clarify such a point would render ex post facto punishment to offenders who acted prior to January 1, 1998.

If the law was intended to fall within the tortured construction suggested by the defense argument, then why is Section 19 included? Nowhere in Section 19 are prior offenses mentioned. Section 19 is used to discuss types of battery. Interestingly, it does not create a new offense for this crime either, so the suggestion that AB 170 changes the actual offense to a new offense is also untrue.

Section 18 does apply the new penalty provisions, and creates a felony enhanced conviction, but the language in Section 32 is intended to prevent offenses committed prior to January 1, 1998 from retroactive enhancement.

Any law which was passed after the commission of the offense for which the party is being tried is an ex post facto law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed. In re Medley, 134 U.S. 160, 171, 10 S.Ct. 384, 33 L.Ed. 835 (1890).

The enactment of a statute or its amendment which imposes a harsher penalty after prior convictions is not an ex post facto law. Alaway v. United States, 280 F.Supp. 326 (C.D.Cal.1968).

IV

FAILURE TO MODEL THE DOMESTIC BATTERY STATUTE ON NRS 484.3792 DOES NOT RENDER THE PRIOR CONVICTIONS UNUSABLE.

The language quoted concerning prior convictions from the 1983 bill regarding DUI priors is surplusage. The language regarding prior offenses in the Domestic Battery law is clear and unambiguous. Such language is not required. The law clearly penalizes new offenses.

V

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Batson Juror Challenge Religion

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Counsel for the defendant requests that this Court enter an order precluding the State from challenging any potential juror on the basis of their religion. Making this request, counsel argue that Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny, should be extended to prevent such challenges. The State respectfully submits that the Court can address the concerns set forth in the defendant's motion without entering the requested order.

The State does not intend to ask any potential juror what their religion is. One would have to assume because of this motion that the defendant would also agree to this restriction. If such questions are voided, the only indication of religious preference would be provided by the potential jurors. If this occurs, the State agrees that a decision concerning whether that person should serve as a juror must not be based upon their religious association. This is not to say that a person should not be excluded for other valid reasons.

If a potential juror makes reference to their religion, it is most likely to demonstrate their high degree of commitment to a belief or position they have stated. If a person maintains a belief or an attitude which prevents or substantially impairs them from performing their duties as a juror, they can be and should be challenged. Easoph v. State, 102 Nev. 316, 319 (1986).

It does not matter what causes a person to maintain a belief or attitude which prevents their performing their duties as a juror. If they cannot set those beliefs or attitudes aside and act impartially and fairly, they should not be jurors. Hess v. State, 73 Nev. 175 (1957). A position which has its basis in a person's religion may be more firmly held than a belief based upon other factors. So long as the reason for the challenge focuses upon the ability or inability to perform the duties of a juror, and not upon the underlying basis, the challenge is appropriate. If fact, to ignore a strong belief that prevents a person from acting as a juror would be improper.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Blood Seizure Motion and Order

CODE
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TO SEIZE BLOOD SAMPLE OF DEFENDANT

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The withdrawal of a blood sample is subject to Fourth Amendment requirements and, therefore, a Search Warrant must be procured before a suspect may be required to submit to such a procedure unless exigent circumstances exist that would justify a warrantless search. Schmerber v. California, 384 U.S. 757 (1966). The State in no way suggests that exigent circumstances exist in the instant case to permit a search or seizure without judicial approval. However, probable cause clearly establishes probable cause and the need to seize a sample of the defendant's blood for evidentiary and comparison purposes. Although the defendant has previously provided three samples of blood on the date of the offense pursuant to NRS 484.383, said samples are deemed of little if any value if not taken and tested within a three month period.

CONCLUSION

It is hereby respectfully requested that be ordered to submit a sample of his blood for all evidentiary, analysis, and comparison purposes in the pending criminal investigation.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

ORDER

IT IS HEREBY ORDERED, and the State is hereby directed, to seize a sample of blood from for all evidentiary, analysis and comparison purposes in the pending criminal investigation.

IT IS FURTHER ORDERED that medical or duly qualified personnel are to be employed to obtain the samples and if there is any resistance, they are directed to use reasonable force to exact this Order.

This Order may be served between the hours of 7:00 a.m., and 7:00 p.m.

DATED this _____ day of _____, .

_____
DISTRICT JUDGE

Blood Test Right to Counsel

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NO VIOLATION OF THE DEFENDANT'S

SIXTH AMENDMENT RIGHTS

The defendant's Sixth Amendment right to counsel did not attach at the time of his blood test or shortly thereafter. The Nevada Supreme Court in McCharles v. State, Dep't of Mtr. Vehicles, 99 Nev. 831 (1983), found that:

> Such tests are not "critical stages" within the meaning of the sixth amendment of the United States Constitution since the absence of McCharles' counsel during the test will not affect his right to a fair trial. See United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The accuracy of the tests may be established after the test has been given and the driver allowed to contact his attorney.

McCharles v. State, Dep't of Mtr. Vehicles, 99 Nev. 831 at 833-834.

In Robertson v. State, 109 Nev. 1086 (1993), Robertson contended that she was denied her right to counsel because the police officer who arrested her did not contact her attorney so as to arrange independent chemical testing of her blood. The Supreme Court, finding that her contention lacked merit, held that, "Appellant did not inform the police that she desired independent testing. Without such a request, the police are not obligated to facilitate independent testing. Schroeder v. State, Dep't. of Motor Vehicles, 105 Nev. 179, 772 P.2d 1278 (1989)." Robertson v. State, 109 Nev. at 1088. Here there is no assertion by the defendant that he requested an independent test.

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Bruton Severance

CODE
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Attorney for Plaintiff
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

ISSUE PRESENTED: SHOULD DEFENDANT MINARD BE SEVERED FROM HIS CODEFENDANTS IN THE TRIAL FOR THE MURDER OF ESTABAN ADAME?

NRS 174.155 provides: "The Court may order two or more Indictments or Informations or both to be tried together if the
offenses, and the defendants, if there is more than one, could have been joined in a single Indictment or Information. The procedure shall be the same as if the prosecution were under such single Indictment or Information.

The basis for the defendant's Motion is claimed to be a violation of the defendant's right to confront and cross examine accusatory witnesses. In support of this proposition the defendant cites Bruton v. United States, 391 U.S. 123 (1968) and Ducksworth v. State, 113 Nev. 780 (1987). In both, Bruton and Ducksworth, which both stand for the proposition that if a codefendant's confession, inculpating the other codefendant, is admitted at trial and the defendant making the statement does not testify at trial, the non-confessing codefendant is denied his Sixth Amendment right to confront his accusers. That factual scenario is not presented in the instant case as the defendants have not confessed.

> The most recent Nevada Supreme Court case addressing the severance issue on the basis of the confrontation clause is Buff and Pacheco v. State of Nevada, 114 Nev. Adv. Op. 131 (1998). In that case, the Supreme Court reiterated the law in Nevada as it applies to severance where the Supreme Court stated, "The decision to sever a joint trial is vested in the sound discretion of the District Court and will not be reversed on appeal unless the appellant 'carries the heavy burden' of showing that the trial judge abused his discretion. Amen v. State, 106 Nev., 106

Nev. 749, 755-56, 801 P.2d, 1354, 1359 (1990). This Court has held '[s]ome form of prejudice always exists in joint trials and such occurrences are subject to harmless error review." Ewish v. State, 110 Nev. 221, 234, 871 P.2d 306 (1994); See NRS 178.598 (any trial defect not impacting substantial rights is disregarded); and Mitchell v. State, 105 Nev. 735, 738-39, 782 P.2d 1340, 1342-43 (1998) (harmless error standard apply to joinder of claims; court tacitly recognized that same standard apply to joinder of defendants)."

Id. at p.9.

In reversing the defendant Pacheco's Motion for Severance the Court held that since Pacheco was precluded from introducing evidence of Buff's initial statement to the police, where he claimed Pacheco was not involved in the killing, the Court was unable to find that the District Court's denial of Pacheco's Motion for Severance was harmless. The instant case presents no scenario where the defendant would be precluded from presenting exculpatory evidence. Curiously, absent from the defendant's Motion is any factual basis for severance on the basis of a "Bruton" issue. Further, the defendant fails to set forth any other factual basis for his claim of prejudice.

In light of the fact that none of the defendants have confessed, there is no "Bruton" issue and since the defendant cannot point to any specific prejudice, the defendant's Motion must be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Bruton Statements

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Attorney for Plaintiff
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

ISSUE PRESENTED: SHOULD DEFENDANT MINARD BE SEVERED FROM HIS CODEFENDANTS IN THE TRIAL FOR THE MURDER OF ESTABAN ADAME?

NRS 174.155 provides: "The Court may order two or more Indictments or Informations or both to be tried together if the
offenses, and the defendants, if there is more than one, could have been joined in a single Indictment or Information. The procedure shall be the same as if the prosecution were under such single Indictment or Information.

The basis for the defendant's Motion is claimed to be a violation of the defendant's right to confront and cross examine accusatory witnesses. In support of this proposition the defendant cites Bruton v. United States, 391 U.S. 123 (1968) and Ducksworth v. State, 113 Nev. 780 (1987). In both, Bruton and Ducksworth, which both stand for the proposition that if a codefendant's confession, inculpating the other codefendant, is admitted at trial and the defendant making the statement does not testify at trial, the non-confessing codefendant is denied his Sixth Amendment right to confront his accusers. That factual scenario is not presented in the instant case as the defendants have not confessed.

> The most recent Nevada Supreme Court case addressing the severance issue on the basis of the confrontation clause is Buff and Pacheco v. State of Nevada, 114 Nev. Adv. Op. 131 (1998). In that case, the Supreme Court reiterated the law in Nevada as it applies to severance where the Supreme Court stated, "The decision to sever a joint trial is vested in the sound discretion of the District Court and will not be reversed on appeal unless the appellant 'carries the heavy burden' of

showing that the trial judge abused his discretion. Amen v. State, 106 Nev., 106 Nev. 749, 755-56, 801 P.2d, 1354, 1359 (1990). This Court has held '[s]ome form of prejudice always exists in joint trials and such occurrences are subject to harmless error review." Ewish v. State, 110 Nev. 221, 234, 871 P.2d 306 (1994); See NRS 178.598 (any trial defect not impacting substantial rights is disregarded); and Mitchell v. State, 105 Nev. 735, 738-39, 782 P.2d 1340, 1342-43 (1998) (harmless error standard apply to joinder of claims; court tacitly recognized that same standard apply to joinder of defendants)."

Id. at p.9.

In reversing the defendant Pacheco's Motion for Severance the Court held that since Pacheco was precluded from introducing evidence of Buff's initial statement to the police, where he claimed Pacheco was not involved in the killing, the Court was unable to find that the District Court's denial of Pacheco's Motion for Severance was harmless. The instant case presents no scenario where the defendant would be precluded from presenting exculpatory evidence. Curiously, absent from the defendant's Motion is any factual basis for severance on the basis of a "Bruton" issue. Further, the defendant fails to set forth any other factual basis for his claim of prejudice.

In light of the fact that none of the defendants have confessed, there is no "Bruton" issue and since the defendant cannot point to any specific prejudice, the defendant's Motion must be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE TO DEFENDANT'S
MOTION IN LIMINE RE: CO-CONSPIRATOR'S STATEMENTS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and offers its Response to the Motion In Limine Re: Co-Conspirator's Statements filed by Defendant on or about , .

This Response is based upon the following Points and Authorities and the pleadings and papers on file herein.

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

> Defendant sets forth his requested belief at page of this Motion:
> It is requested by way of this motion that a 'James Hearing' outside the presence of the jury be ordered before determining the admissibility of the extra-judicial statements of the alleged co-conspirator, , through informant .

The State should be allowed to introduce the statements of one or both defendants made during the conspiracy -- i.e., immediately before, during and after the murder---until the defendants' flight was halted following the high-speed chase in California. It is universally accepted that the extra-judicial statements made by one co-conspirator during the conspiracy are admissible against another co-conspirator, without violating the Constitution. McDowell v. State, 103 Nev. 527, 530 (1987), citing U.S. v. Gypsum, 333 U.S. 364 (1948); U.S. v. Davis, 809 F.2d 1194 (6th Cir. 1987). Where two co-defendants/co-conspirators attempt to escape or flee after committing an unlawful objective, then the statements of either are admissible against the other during the period of flight or escape. Gunter v. State, 94 S.W.2d 747 (Tex.). See also State v. Martin, 265 P.2d 297 (Kan.); Fairris v. State, 287 P.2d 708 (Okla.); Myers v. State, 258 S.W. 821 (Tex.); State v. Winston, 355 N.W.2d 553 (Wis.); People v. Bonner, 43 P.2d 343 (Cal.); Lemley v. State, 117 S.W.2d 435 (Tex.); Reynolds v. Commonwealth, 61 S.W.2d 288 (Ky.); Flores v. State, 231 S.W. 786 (Tex.). The amount of evidence necessary to prove the existence of the conspiracy may be "slight"; it is enough that only "prima facie" evidence is produced. Crawford v. State, 95 Nev. 471, 474 (1979).

Based upon the preliminary hearing transcript alone, which the State hereby incorporates by reference into this Response, the State has already exceeded the minimal standard of proof necessary to show that a conspiracy existed.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Bruton Conspiracy

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S
MOTION IN LIMINE
RE: CO-DEFENDANT'S STATEMENTS
PURSUANT TO BRUTON

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and Deputy District Attorney, and offers its Opposition to Motion in Limine Re: Co-defendant's Statements Pursuant to Bruton.

This response is based upon the following Points and Authorities and the pleadings and papers on file herein.

POINTS AND AUTHORITIES

STATEMENT OF THECASE

STATEMENT OF THE FACTS

ARGUMENT

At a trial where two defendants are tried jointly, a statement made by one co-defendant may be admitted into evidence so long as it does not refer to, or "facially incriminate" the other co-defendant. Bruton v. United States, 391 U.S. 123, 127-128 (1968); Lisle v. State, 113 Nev. at 692-693.

Additionally, it is universally accepted that the statements made by one co-conspirator are admissible against another co-conspirator, even if the statements expressly incriminate the other co-conspirator, so long as the statements were made during the course of the conspiracy. McDowell v. State, 103 Nev. 527, 529-530 (1987); see also U.S. v. Gypsum, 333 U.S. 364 (1948); U.S. v. Davis, 809 F.2d 1194 (6th Cir. 1987). The courts have consistently held that the admissibility of a co-conspirator's statement is not predicated upon the filing of the conspiracy charge. Cranford v. State, 95 Nev. 471, 473 (1979), citing Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), and Jasch v. State, 563 P.2d 1327 (Wyoming 1977). It is sufficient that the co-conspirators agreed to achieve any unlawful purpose or goal. The Courts have also consistently held that the conspiracy continues during any period of joint flight or escape by the co-conspirators. See, e.g., Gunter v. State, 94 S.W.2d (Tex.); see also State v. Martin, 265 P.2d 297 (Kan.); Fairress v. State, 287 P.2d 708 (Okl.); Meyers v. State, 258 S.W. 821 (Tex.); State v. Winston, 355 N.W.2d 553 (Wis.); People v. Bunner, 43 P.2d 343 (Cal.); Lemley v. State, 117 S.W.2d 435 (Tex.); Reynolds v. Commonwealth, 61 S.W.2d 288 (Ky.); Flores v. State, 231 S.W. 786 (Tex.).

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Canvas For Guilty Plea

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The defendant claims that he was not fully informed that his entry of a guilty plea in this case and subsequent conviction would result in his being revoked from his felony probation.

The Supreme Court of Nevada has held that an accepted guilty plea will be considered properly accepted if the Trial Court canvassed the defendant to determine whether he knowingly and intelligently entered the plea. See Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994) and Baal v. State, 106 Nev. 69, 787 P.2d 391 (1990). The Court held in Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986) that the Trial Court must address the defendant personally to determine that he understands the nature of the charge to which he is entering his guilty plea. The Court can recite the elements of the charge or have one of the attorneys do that recitation. Then the Court can elicit a statement from the defendant that he understands the elements of the charge or an admission from the defendant that he committed the offense charged. The Supreme Court of Nevada set out other matters the Trial Court must inquire of the defendant during a guilty plea canvas in Wynn v. State, 96 Nev. 673, 615 P.2d 946 (1980). Those matters included advising the defendant that he is giving up certain Federal Constitutional rights including the right against self incrimination, the right to a trial by jury, and the right to confront, that is, to cross examine witnesses against him at that jury trial. Additionally, the Trial Court is to inquire of the defendant that no promises of leniency have been made. That he is pleading guilty because he in fact is guilty of the crime to which he has entered his plea and for no other reason. See also, Stocks v. Warden, Nev. State Prison, 86 Nev. 758, 476 P.2d 469 (1970).

The Supreme Court of Nevada has held that a guilty plea is presumptively valid. The burden is on the defendant to show that it was not entered knowingly and intelligently. See Bryant, cited herein above.

The Supreme Court of Nevada has held that only direct consequences of a guilty plea, such as punishment, are proper matters for the Trial Court's canvas of the defendant. The defendant need not be advised of collateral consequences of his plea, such as in the instant case the effect his guilty plea would have on his felony probation. See generally, Bryant, cited herein above and Anushevitz v. Warden, Nev. State Prison, 86 Nev. 191, 467 P.2d 115 (1970) which held Trial Court had no duty to advise defendant of the prospects for parole during guilty plea canvassing.

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Character of Defendant Relevance Admissibility Limits

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

MRS 48.045(1) allows the defendant in a criminal case to offer good character evidence, and further authorizes the State to offer bad character evidence to rebut any good character evidence offered by the accused. However, the Nevada Supreme Court has adopted the majority rule that the proof offered by the accused must be confined to the particular traits of character that are relevant to the conduct with which the accused has been charged. Daly v. State, 99 Nev. 564, 571 (1983), citing Freeman v. State, 46 P.2d 967, 972-73 (Alaska 1971) ; State v. AltamiraflQ, 569 P.2d 233, 235 (Arizona 1977); People V. Sexton, 555 P.2d 1151, 1154 (Colorado 1976); State v. Blake, 249 A.2d 232, 234 (Connecticut 1968); State v. Dobbins, 639 P.2d 4 (Idaho 1981); State V. Howland, 138 P.2d 424 (Kansas 1943); Hallengren v. State, 286 A.2d 213, 216 (Maryland 1972); United States v. Angelini, 678 F.2d 380 (1st Cir. 1982); United States v. Hewitt, 634 F.2d 277, 279 (5th Cir. 1981)

CONCLUSION

Character of Victim Admissibility

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION IN LIMINE – CHARACTER OF VICTIM

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Evidence of the victim's character is inadmissible in a homicide case unless: (1) Where character or a trait of character of a person in an essential element of a charge, claim or defense; and (2) where the character of the victim relates to the reasonableness of force used by the accused in self defense. State v. Sattler, 956 P.2d 54, (Mont. 1998); State v. Arrasmith, 1998 WL 151494 (Idaho App. 1998).

The Nevada Supreme Court in addressing character evidence pursuant to the statutory provisions of NRS 48.045 stated:

> [B]efore any evidence is admissible, it must be relevant. NRS 48.025(2). Character evidence is no exception.

Coombs v. State, 91 Nev. 489, 538 P.2d 162 (1975).

See also Libby v. State, 109 Nev. 905, 915, 859 P.2d 1051, 1057 (1993) (evidence of a victim's character or trait of character is not admissible unless specifically brought into issue). In Coombs the court addressed the defense attempt to proffer a self-defense case and sought to admit evidence of the victim's violent character.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. NRS 48.015. Further, determinations of relevancy are within the discretion of the trial court. Brown v. State, 107 Nev. 27 (1991).

Further, there is a requirement that even if a showing of relevance can be made, this court must determine whether the probative value outweighs the prejudicial effect of such evidence. People of Territory of Guam v. Ted Taotao, 896 F.2d 371 (9th Cir. 1990); State v. Vierra, 872 P.2d 728 (Idaho App. 1994).

Therefore, the State specifically requests to this Court an Order prohibiting the defense from offering any evidence of the victim's character without a prior showing of the relevance of that testimony and that the probative value outweighs any prejudicial effect outside the presence of the jury. Such a procedure will ensure that only relevant evidence is admitted and that no attempt is made to improperly taint the victim's character in front of the jury in this case.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Character of Victim Reputation and Opinion

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NRS 48.045(1) (b) permits the admission of relevant character evidence pertaining to the victim of a crime. However, pursuant to MRS 48.045 (1), proof of character may be established only by testimony as to reputation or in the form of an opinion. The character of the victim cannot be established by proof of specific acts pursuant to NRS 48.045(1) (b) and MRS 48.055(1) See also Government of Virgin Islands v. Carino, 631 Fed. 2d 226 (Third Cir. 1980)

The Nevada Supreme Court has set forth the limited circumstances in which specific acts of violence by the victim of a crime may be admissible where self-defense is alleged. In Burgeon v. State, 102 Nev. 43 (1986), the Court held:

> When it is necessary to show the state of mind of the accused at the time of the commission of the offense for the purpose of establishing self-defense, specific acts which tend to show that the deceased was a violent and dangerous person may be admitted, provided that the specific acts of violence of the deceased were known to accused or had been communicated to him. Burgeon, Id. at pp.45-46, citing State v. Sella, 41 Nev. 113 (1970)

Defendant's motion acknowledges Burgeon -- and then asks this Court to ignore it. Defendant's motion notes that various commentators and appellate courts of other states have stated that specific acts of the victim should be admissible in self defense cases even if the charged defendant was unaware of those acts. However, defendant elects to ignore the fact that the Nevada Supreme Court has reached the opposite conclusion in Burgeon.

CONCLUSION

Change of Venue

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

LEGAL STANDARD FOR CHANGE OF VENUE

Contrary to the position stated in the Instant Motion, there are actually two different time periods in which a criminal defendant can request a change of venue. Obviously by the inherent nature of the Instant Motion, defense counsel is conceding that insufficient evidence exists to establish a change of venue prior to the jury selection process.

The State has no objection to the defense reserving their right to raise a Motion For Change of Venue should such factual evidence exist during the jury selection process.

The State is confident that at that time, should the Court will conduct the appropriate inquiry as to whether sufficient facts exist to render a fair and impartial jury impossible to seat. Further, that the articulated tests set forth in Sonner v. State, 112 Nev. 1328, 930P.2d 707 (1996), will be properly applied regarding any pre-trial publicity.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Child Endangerment

CODE
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

STATE'S RESPONSE TO DEFENSE MOTION TO DISMISS

I.

STATEMENT OF THE FACTS
ARGUMENT

WILLFUL ENDANGERMENT DOES NOT REQUIRE A CHILD ACTUALLY SUFFER HARM.

NRS 200.508 divides child neglect into two separate crimes, one a gross misdemeanor, the other a felony, and defines the offense in terms of two different kinds of conduct. One crime is committed under NRS 200.508(1)(a)) by a person who actively "causes a child" to suffer unjustifiable pain; the other crime is committed under NRS 200.508(1)(b)) by a person who passively "permits or allows" a child to suffer unjustifiable pain or to be placed in a

situation where the child "may suffer" pain. Rice v. State, 113 Nev. 1300,949 P.2d 262, (Nev. 1997)

The relevant portions of NRS 200.508 state that criminal liability will be found for

1. A person who:

> (a) Willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect; or (b) Is responsible for the safety or welfare of a child and who permits or allows that child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect.

NRS 200.508(3) defines several of the terms used in NRS 200.508(1)(a) and (b) as follows:

> As used in this section:
>
> (a) "Abuse or neglect" means ... negligent treatment or maltreatment of a child under the age of 18 years, as set forth in NRS 432B.140 ..., under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.
> b) "Allow" means to do nothing to prevent or stop the abuse or neglect of a child in circumstances where the person knows or has reason to know that the child is abused or neglected.
> (c) "Permit" means permission that a reasonable person would not grant and which amounts to a neglect of responsibility attending the care, custody and control of a minor child.

In Smith, the court held that the child neglect statutes, NRS 200.508(1)(a) and NRS 200.508(1)(b), "when read as a whole ... require knowledge or intent on the part of the actor as a prerequisite to finding guilt." The court held that the "statutory definitions of 'allow' and 'permit' ... are not drafted as clearly as would be preferred, but they do establish with sufficient clarity the state of mind required to find guilt." Smith defines "permit" so as to require that "a violator must act in a way that 'a reasonable person' would not."

In this way, Smith clarified the statutory "requirement of knowledge and reasonableness" which "defines the state of mind required for a finding of guilt and effectively precludes punishment for inadvertent and ignorant acts."

Additionally, the "situation" which the child must be "placed in" is clearly defined by the remainder of the statute which states that the child must be placed in a situation where it "may suffer physical pain or mental suffering as the result of abuse or neglect."

In Hughes v. State, 112 Nev. 84, 910 P.2d 254 (Nev. 1996), the court held that potentially exposing a child to possible harm based on criminal activity is child neglect, even though the events which could expose the child to harm never occur. The facts involved a defendant transporting his daughter in a stolen car. In Hughes, Officer Curry explained police officer procedure upon encountering a person in possession of a stolen vehicle. The court found the testimony admissible to prove endangerment of a child.

In Hughes, no felony car stop actually occurred. But the court upheld the admission of Officer Curry's testimony to establish that the transportation of a child in a stolen vehicle places that child in a situation where he or she may suffer physical pain or mental suffering. Therefore, the possibility of harm is all that is needed for a violation of NRS 200.508. There is no requirement that the harm feared occur, or even be reasonably certain to occur.

Of interest here is that Officer Curry's testimony was the only evidence presented at trial to support a conviction of child endangerment. In particular, appellant's daughter testified that she was a passenger in a stolen vehicle on a number of occasions and was present when her father stole the keys to a second vehicle off a grocery cart. The court ruled that the jury could reasonably infer from the evidence presented that by involving his daughter in such criminal activities, appellant caused her to suffer unjustifiable mental suffering as a result of neglect or placed her in a situation where she may suffer physical pain or mental suffering as the result of neglect.

Smith defines "permit" so as to require that "a violator must act in a way that 'a reasonable person' would not." A reasonable person would not abandon her infant in this matter, or attempt to resume it's care when so intoxicated. A "reasonable person" makes proper arrangements for the care of a child. Failure to do so potentially subjects the child to a situation where its safety and welfare is endangered.

NRS 432B.140 states:

> "Negligent treatment or maltreatment of a child occurs if a child has been abandoned, is without proper care, control and supervision or lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child because of the faults or habits of the person responsible for his welfare or his neglect or refusal to provide them when able to do so.

CONCLUSION

Therefore, based on the foregoing facts and law, the State respectfully requests that the defendant's motion to dismiss be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Child Out-Of-Court Statement

CODE 2490
Richard A. Gammick
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

NOTICE OF INTENT TO USE PRIOR STATEMENTS OF WITNESSES

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby gives this Notice of Intent to Use Prior Statements of Witnesses. This Motion is supported by all papers and pleadings on file herein, the attached Points and Authorities, and any oral argument this Honorable Court may entertain on this Motion.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

LEGAL ARGUMENT

NRS 51.385 states in pertinent part:

> 1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child is admissible in a criminal proceeding regarding that sexual conduct if the:
>
> (a) Court finds, in a hearing out of the presence of the jury, that the time, content, and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and
>
> (b) Child either testifies at the proceeding or is unavailable or unable to testify.
>
> 2.....

The Supreme Court of Nevada has upheld the constitutionality of this statute and has found that it does not violate the Confrontation Clause of the United States Constitution. See Bockting v. State, 109 Nev. 103, 847 P.2d 1364.

The Court has also required strict compliance with the provision for a hearing out of the presence of the jury to determine whether or not the "...time, content, and circumstances of

the statement provide sufficient circumstantial guarantees of trustworthiness;...." See NRS 51.385; Lincoln v. State, 115 Nev. Ad. Op. 45 (1999); Quevedo v. State, 113 Nev. 35, 930 P.2d 750 (1997); Felix v. State, 109 Nev. 151, 849 P.2d 220 (1993); and Lytle v. State, 107 Nev. 589, 816 P.2d 1082 (1991).

CONCLUSION

Based on the legal and factual discussion herein above, the State respectfully requests that this Honorable Court schedule a hearing to determine the whether or not the statements made by the juvenile victims in this case comply with the admissibility requirements of NRS 51.385 and that this hearing be

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Child Victim Sexual Assault Psychiatric Evaluation

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION FOR ORDER COMPELLING EVALUATION OF ALLEGED VICTIMS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The defendant relies on the holding in Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) as the sole basis for requesting a psychiatric evaluation of the victim in this case. Further, the defendant sets out the two reasons cited in Warner as the bases for this Honorable Court to grant this Motion. Those bases are there is a question of the victim's credibility and there is no independent evidence of the offenses, other than the victim's testimony.

The State respectfully counters that the controlling cases involving this issue are Marvelle v. State, 114 Adv. Op. 103 (Nev. 1998) and Keeney v. State, 109 Nev. 220, 850 P.2d 311 (1993). In both these cases, the Supreme Court of Nevada has held that there are four factors the trial court should consider when ruling on this motion. The Court said :

> A district court has discretion to grant a request for a psychological evaluation of a child-victim, based on the facts and circumstances of each case, after considering four factors: 1) whether the State has employed an expert in psychiatry or psychology to examine the child; 2) whether there is a compelling need to protect the child; 3) whether the evidence of the crime has little or no corroboration beyond the child's testimony; and 4) whether there is a reasonable basis to believe that the child's mental or emotional state may have affected (his) veracity.

See Marvelle v. State, 114 Adv. Op. 103 at page 5 and Keeney v. State, 109 Nev. 220, 226, 850 P.2d 311, 314 (1993). The State will review each factor in the order set out by the Supreme Court.

The first factor is whether the State has employed an expert in psychiatry or psychology to examine the child-victim. In the instant case, the State has not employed such an expert. No such State requested examination has been done of the child-victim. Furthermore, the State will not be calling anyone purporting to be an expert as was the situation in Marvelle,

cited herein above. Of course, should this Honorable Court grant the defendant's Motion in this regard, the State reserves the right to call an expert of its own concerning any findings and opinions of the defense expert.

The second factor is whether there is a compelling need to protect the child-victim. The State will not cite a specific compelling need to protect the child-victim. However, the respectfully urges caution in that no evaluation of a child-victim should be undertaken lightly. Such an evaluation is a serious matter which will have an effect on the child-victim.

The third factor is whether evidence of the crime has little or no corroboration beyond the child-victim's testimony.

The fourth and final factor is whether there is a reasonable basis to believe that the child-victim's mental or emotional state may have affected his veracity. The victim is mentally handicapped. However, there has been no offer made by the defendant that the victim's mental or emotional state may have affected his veracity.

Therefore, of the four factors cited herein above, the State respectfully contends there is only one factor that may be favorable to the defendant. That is factor number two. The State can not cite a specific compelling need to protect the child-victim in this case. As discussed herein above, it is a general concern to have a child-victim psychiatrically evaluated. Otherwise, the State respectfully contends that the other three factors come out against granting the defendant's Motion.

CONCLUSION

Based on the arguments set out herein above, the State respectfully requests that this Honorable Court deny the defendant's Motion for Order Compelling Evaluation of Alleged Victims.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Child Witness Competency

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE TO MOTION TO DETERMINE COMPETENCY OF CHILD WITNESSES

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The standard of competence for child witnesses is that the child must have the capacity to receive just impressions and possess the ability to relate those impressions truthfully. Lanoue v. State, 99 Nev. 305, 307 (1983); Wilson v. State, 96 Nev. 422, 423 (1980). The determination of competence is left to the sound discretion of District Court and will not be disturbed on appeal absent a clear abuse of discretion. Wilson, Id.; Terrible v. State, 78 Nev. 159, 160 (1962). A reviewing court examining the issue of competency is not limited solely to the competency voir dire examination of the child, but may also look to the substantive testimony regarding the crimes in question given by the child at the preliminary hearing and trial. Wilson, Id.; Terrible, Id.; Lanoue, Id.

Although a trial court must evaluate a child's competency on a case-by-case basis, some relevant factors to be considered include: (1) The child's ability to receive and communicate information; (2) the spontaneity of the child's statements; (3) indications of "coaching" and "rehearsing"; (4) the child's ability to remember; (5) the child's ability to distinguish between truth and falsehood; and (6) the likelihood that the child will give inherently improbable or incoherent testimony. Felix v. State, 109 Nev. 151, 173 (1993).

As in every case, the prosecutor will request that a brief competency examination be held for each of the two child victims, prior to their being presented to the jury. Both girls had no trouble whatsoever answering the basic competency questions that were asked of them at the prior preliminary hearing.

Dated this _____ day of _____, .

RICHARD A. GAMMICK

District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Child Witness Competency II

CODE
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S MOTION TO DECLARE CHILD WITNESSES INCOMPETENT

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Nevada Supreme Court has repeatedly set forth a simple standard for the determination of the competency of a child witness.

> **The standard of competence which a child witness must demonstrate is that he has the capacity to receive just impressions and possesses the ability to relate them truthfully**. Griego v. State, 111 Nev. 444, 448 (1995) (Emphasis added.); see also Lanoue v. State, 99 Nev. 305, 307 (1983), Wilson v. State, 96 Nev. 422, 423 (1980), Fields v. Sheriff, 93 Nev. 640 (1977), where the court pronounced the exact same standard.

A trial court's finding of competence will not be reversed on appeal absent a clear abuse of discretion. Griego, id. at p.448; More v. State, 105 Nev. 378, 388 (1989); Wilson, id, at p.423; Terrible v. State, 78 Nev. 159 (1962).

A witness is not incompetent to testify simply because there are a few inconsistencies in his or her prior testimony or report. The objections of the defendant go to the **weight** of the girls testimony, not to their competency to testify. The court's primary function in a competency evaluation is to determine whether the child has the mental capacity to perceive events accurately and the verbal skills to relate them truthfully.

witness.

CONCLUSION

As noted in the legal discussion section supra, the standard of competence for a child witness is 1) the child must have the capacity to receive just impressions, and 2) the child must posses the ability to relate them truthfully. See numerous Nevada Supreme Court cases cited supra. The Court sat through the lengthy evidentiary hearings in this matter. The Court can easily conclude that the two-prong competency standard is satisfied in the case at bar. The

Court should consider not only the testimony from the cold record, but the demeanor of the two little girls on the witness stand. These little girls clearly have the mental capacity to receive just impressions and they clearly possess the ability to relate them truthfully.

Given the passage of time between the crime, the preliminary hearing, and the evidentiary hearing, it is hardly surprising that two little girls have made a few inconsistent statements. This honorable Court has presided over a number of child sex trials. Small children who have been subjected to stressful events do not survive lengthy, detailed cross examination by defense counsel, as well as do police officers and adults.

All of the objections made in defendant's motion go to the weight, and not the admissibility, of the little girls testimony. Both girls are clearly competent to testify.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Co-conspirator Hearsay Admissibility

CODE
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Attorney for Plaintiff
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

It is well settled that hearsay statements may be admitted into evidence where the statement is made by a co-conspirator of a party during the course and furtherance of a conspiracy. Goldsmith v. Sheriff, 85 Nev. 295, 454 P.2d 86 (1969). As a prerequisite to the application of the "statements of co-conspirators, exception to the hearsay rule, it must be determined by reference to independent evidence that a conspiracy existed. Fish v. State, 92 Nev. 272, 275, 549 P.2d 338, 340 (1976). The amount of independent evidence necessary to prove the existence of a conspiracy may be slight, it is enough that only prima facie evidence of the fact is produced. Id.

A case lending guidance to the Court on the issue of the admissibility of the co-conspirator statements is McDowell v. State, 103 Nev. 527, 746 P.2d 149 (1987). In that case, McDowell was tried with his co-conspirators and found guilty of two counts of Murder With the Use of a Deadly Weapon, one count of Robbery With the Use or a Deadly Weapon, and three counts of Conspiracy. The most damaging evidence against McDowell admitted at the trial were various co-conspirator out-of-court declarations. In determining the admissibility of the extra-judicial statements, the District Court properly found the existence of a conspiracy by "slight evidence" as required in Nevada. Citing Fish v. State supra. Once the Court had found the existence of a conspiracy for purposes of NRS 51.035(3)(e) the admission of the co-conspirator's statement was proper. In McDowell, the Nevada Supreme Court went on to state: According to NRS 51.035(3)(e), an out-of-court statement of a co-conspirator made during the course and in furtherance of the conspiracy is admissible as non-hearsay against another co-conspirator. Pursuant to this statute, it is necessary that the co-conspirator who uttered the statement be a member of the conspiracy at the time the statement was made. It does not require the co-

conspirator against whom the statement is offered to have been a member at the time the statement was made." McDowell v. State, 103 Nev. 527, 529, 530.

The Nevada Supreme Court also addressed the confrontation clause and its application to NRS 51.035(3)(e) when it stated: The Federal position is consistent with our interpretation. In construing Federal Rule of Evidence 801(D)(2) (capitally), which is analogous to NRS 51.035(3)(e), the Federal courts have consistently held that extra-judicial statements made by one co-conspirator during the conspiracy are admissible, without violation of the confrontation clause, against the co-conspirator who entered the conspiracy after the statements were made. See U.S. v. Gypsum, 333 U.S. 364, 68 S.Ct. 525, 92, L.Ed 746 (1948); U.S. v. Davis, 809 F.2d 1194 (6th Cir. 1987). Id.

The Court went on to state in McDowell that it was not necessary for the District Court to explicitly rule as to the time when McDowell entered the conspiracy, and hence the Nevada Supreme Court declined to require such a ruling. Simply by joining the conspiracy McDowell had implicitly adopted all of his fellow co-conspirators prior acts and declarations in furtherance of the conspiracy. McDowell, 103 Nev. at 530.

A recent case addressing the existence of a conspiracy is Marlo Thomas v. State of Nevada, 114 Nev. Adv. Op. 122 (Nov. 1988). In Thomas, the defendant challenged the sufficiency of the evidence with respect to a conviction for conspiracy to commit murder and/or robbery. In that case, the Supreme Court stated:

> Conspiracy is an agreement between two or more persons for an unlawful purposes. Doyle, 112 Nev. at 894, 921 P.2d at 911. "Conspiracy is seldom susceptible as direct proof and is usually established by inference from the conduct of the parties." Gator v. State, 106 Nev. 785, 790 Note 1, 801 P.2d 1372, 1376 Note 1 (1990) (Quoting State v. Dressel, 513 P.2d 187, 188 (NM 1973)), overruled on other grounds, Barone v. State, 109 Nev. 1168, 866 P.2d 291 (1993). Therefore, if "a coordinated series of acts" furthering the underlying offense is "sufficient to infer the existence of an agreement," then sufficient evidence exists to support a conspiracy conviction. Id.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Co-conspirator's Statements

CODE
Richard A. Gammick
#001510
P.O. Box 30083
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Once a conspiracy is shown to exist, all conspirators become liable for any foreseeable acts committed in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180 (1946); State of Nevada v. Wilcox, 105 Nev. 434, 776 P.2d 549 (1989); McKinney v. Sheriff, 93 Nev. 70 (1977). It is not necessary to plead a conspiracy in a criminal indictment or information if the evidence shows its existence. Goldsmith v. Sheriff, 85 Nev. 295, 304, 454 P.2d 86 (1969).

The existence of a conspiracy may be proved entirely by circumstantial evidence and as a general proposition, a conspiracy can be proved in no other way. (Goldsmith v. Sheriff, supra; People v. Massey, 312 P.2d 365 (Cal. App. 1957).

The statements of coconspirators made during the course of and in furtherance of the conspiracy are clearly admissible and exempt from the hearsay exclusion. NRS 51.035(3)(e); McDowell v. State, 103 Nev. 527, 746 P.2d 149 (1987).

Furthermore, the conspiracy does not necessarily end with the commission of the substantive crime. State v. Wilcox, supra; Goldsmith v. Sheriff, supra. The duration of the conspiracy extends to affirmative acts of concealment. Crew v. State, 100 Nev. 38, 46, 675 P.2d 986 (1984). This would include statements made to police in an attempt to "get away with" the commission of the crime.

CONCLUSION

Upon a showing of a conspiracy with competent evidence, however slight, the acts and statements of a coconspirator who is not on trial are admissible if they were made during and in furtherance of the conspiracy. Goldsmith v. Sheriff, supra, at page 305; Crew v. State, supra, at page 46. In the admission of this type of evidence the trial court has wide discretion. Goldsmith v. Sheriff, supra, at page

305.

Plaintiff hereby respectfully requests that all such acts and statements be admitted at trial ‘in the instant matter.

DATED this day of , .

RICHARD A. GAMMICK
District Attorney

By_____
Deputy District Attorney

Co-conspirator's Statements II

CODE
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#001510
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

ISSUE PRESENTED: SHOULD DEFENDANT MINARD BE SEVERED FROM HIS CODEFENDANTS IN THE TRIAL FOR THE MURDER OF ESTABAN ADAME?

NRS 174.155 provides: "The Court may order two or more Indictments or Informations or both to be tried together if the

offenses, and the defendants, if there is more than one, could have been joined in a single Indictment or Information. The procedure shall be the same as if the prosecution were under such single Indictment or Information.

The basis for the defendant's Motion is claimed to be a violation of the defendant's right to confront and cross examine accusatory witnesses. In support of this proposition the defendant cites Bruton v. United States, 391 U.S. 123 (1968) and Ducksworth v. State, 113 Nev. 780 (1987). In both, Bruton and Ducksworth, which both stand for the proposition that if a codefendant's confession, inculpating the other codefendant, is admitted at trial and the defendant making the statement does not testify at trial, the non-confessing codefendant is denied his Sixth Amendment right to confront his accusers. That factual scenario is not presented in the instant case as the defendants have not confessed.

> The most recent Nevada Supreme Court case addressing the severance issue on the basis of the confrontation clause is Buff and Pacheco v. State of Nevada, 114 Nev. Adv. Op. 131 (1998). In that case, the Supreme Court reiterated the law in Nevada as it applies to severance where the Supreme Court stated, "The decision to sever a joint trial is vested in the sound discretion of the District Court and will not be reversed on appeal unless the appellant 'carries the heavy burden' of showing that the trial judge abused his discretion. Amen v. State, 106 Nev., 106 Nev. 749, 755-56, 801 P.2d, 1354, 1359 (1990). This Court has held '[s]ome form

of prejudice always exists in joint trials and such occurrences are subject to harmless error review." Ewish v. State, 110 Nev. 221, 234, 871 P.2d 306 (1994); See NRS 178.598 (any trial defect not impacting substantial rights is disregarded); and Mitchell v. State, 105 Nev. 735, 738-39, 782 P.2d 1340, 1342-43 (1998) (harmless error standard apply to joinder of claims; court tacitly recognized that same standard apply to joinder of defendants)."

Id. at p.9.

In reversing the defendant Pacheco's Motion for Severance the Court held that since Pacheco was precluded from introducing evidence of Buff's initial statement to the police, where he claimed Pacheco was not involved in the killing, the Court was unable to find that the District Court's denial of Pacheco's Motion for Severance was harmless. The instant case presents no scenario where the defendant would be precluded from presenting exculpatory evidence. Curiously, absent from the defendant's Motion is any factual basis for severance on the basis of a "Bruton" issue. Further, the defendant fails to set forth any other factual basis for his claim of prejudice.

In light of the fact that none of the defendants have confessed, there is no "Bruton" issue and since the defendant cannot point to any specific prejudice, the defendant's Motion must be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Competency Jurisdiction to Determine

IN THE JUSTICE COURT OF RENO TOWNSHIP

IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

* * *

THE STATE OF NEVADA,

Plaintiff, RJC:

v. DEPT:

,

Defendant.

_____/

OPPOSITION TO MOTION TO DISMISS CRIMINAL COMPLAINT

COMES NOW, the State of Nevada, and hereby opposes the defendant's Motion to Dismiss Criminal Complaint. Said Opposition is based upon all of the papers and pleadings on file herein, as well as the Points and Authorities and exhibits attached hereto.

ARGUMENT

1. THIS COURT LACKS JURISDICTION OVER SAID MOTION

The defense opens its Motion with the assertion that a person cannot be held accountable for a public offense while incompetent. NRS 178.400(1).

The operative language makes it clear that a person cannot be "tried or adjudged to punishment for a public offense while he is incompetent". NRS 178.400(1).

It is axiomatic that only the District Court has jurisdiction over trial or judgement regarding the crime of murder. Therefore, this Court lacks jurisdiction over this Motion pursuant to NRS 178.400(1).

This position is further enhanced by NRS 178.405 which requires suspension of the trial or judgement when doubt arises on the issue of competence. Competence must therefore be decided by the District Court before which the trial or judgement would take place if competence was found. See, NRS 178.400 et seq.

Indeed, the definition of "incompetent" is when a person is not of sufficient mentality to understand the nature of the criminal charges, and because of that insufficiency, is unable to aid and assist counsel. NRS 178.400(2). The issue of criminal competency is a finding that can only be made by a District Court with jurisdiction over criminal matters.

The finding of competency or incompetency, for criminal trial purposes, is left to the sound discretion of the District Court with jurisdiction over criminal matters, and not the Family Court, which only has jurisdiction over civil temporary involuntary commitments. NRS 3.223.

With all due respect to the Reno Justice Court, it lacks jurisdiction to decide the issue of the defendant's current competence to stand trial. The matter must be transferred to the proper District Court department having jurisdiction over the filing of this criminal case.

II. THE ORDER BY THE FAMILY COURT IS IRRELEVANT TO THE CRIMINAL CHARGES

The Family Court has jurisdiction over involuntary court ordered admission to a mental health facility brought pursuant to NRS 433A.200 to 433A.330, inclusive. These statutes cover involuntary commitment by spouses, parents, adult children or legal guardians, etc.

The instant case is a criminal case of murder, brought pursuant to NRS Chapter 200 by the Washoe County District Attorney, by and through an arrest warrant issued by the Reno Justice Court, based on information provided by the Washoe County Sheriff's Office and the Nevada Highway Patrol. Thus, the Family Court and its orders have no relevance to a criminal proceeding brought before the courts with jurisdiction over criminal matters.

III. DUE PROCESS

The defendant admits that the State may protect the community from the dangerous tendencies of some individuals who are mentally ill. Addington v. Texas, 441 US 418 (1979;

Jackson v. Indiana, 406 US 715 (1972).

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Competency Finding of – Stay of Proceedings

IN THE JUSTICE COURT OF SPARKS TOWNSHIP

IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

* * *

THE STATE OF NEVADA,

Plaintiff, SJC:

v. DEPT:

,

Defendant.

_____/

NOTICE OF MOTION AND MOTION FOR APPOINTMENT OF PSYCHIATRISTS IN ORDER TO EVALUATE DEFENDANT'S LEGAL COMPETENCE TO STAND TRIAL PURSUANT TO NRS 178.400-178.425

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

PURSUANT TO NRS 178.415 THE COURT MUST APPOINT EXPERTS FOR THE PURPOSE OF DETERMINING DEFENDANT'S COMPETENCE.

The doubt mentioned in NRS 178.405 means doubt in the mind of the trial court, rather than counsel or others. People v. Jensen (1954) 43 Cal.2d 572, 275 P.2d 25. A determination whether doubt exists rests largely within the discretion of the trial judge. Hollander v. State (1966) 82 Nev. 345, 418 P.2d 802; People v. Aparicio (1952) 38 Cal.2d 565, 241 P.2d 221; People v. Gilberg (1925) 197 Cal. 306, 240 P. 1000. This issue may be suggested to the court or it may be inquired into by the court of its own motion. If the court determines a doubt to exist, it must suspend the trial and inquire into the sanity of the accused. People v. Vester (1933) 135 Cal.App. 223, 26 P.2d 685; and see Krause v. Fogliani (1966) 82 Nev. 459, 421 P.2d 949. Upon declaration of a doubt as to the defendant's competence to stand trial for a misdemeanor, the court of jurisdiction shall appoint a psychiatric social worker, or other person who is especially qualified by the division of mental hygiene and mental retardation of the department of human resources, to examine the defendant. NRS 178.415.

Once a doubt is declared by the court or the defense attorney, it is mandatory that the ongoing criminal proceedings be stayed until the question of competence is determined. NRS 178.405.

ONCE THE TRIAL COURT DECLARES A DOUBT AS TO DEFENDANT'S COMPETENCE NO FURTHER PROCEEDINGS MAY OCCUR IN THE ACTION ABSENT RESOLUTION OF THE COMPETENCE ISSUE.

The trial court, upon declaration of a doubt, "shall suspend the trial or the pronouncing of judgment...until the question of competence is determined." NRS 178.405.

This mandatory language requires that no further proceedings may occur prior to the resolution of the competency issue. The test to be applied in determining competency must be whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. Dusky v. United States (1960) 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824. A hearing to determine a defendant's competency is constitutionally and statutorily required where a reasonable doubt exists on the issue. Moore v. United States (9th Cir.1972) 464 F.2d 663, 666; Warden v. Conner (1977), 93 Nev. 209, 210-211, 562 P.2d 483 Whether such a doubt is raised is within the discretion of the trial court. Kelly v. State (1977) 93 Nev. 154, 155, 561 P.2d 449; Williams v. State (1969) 85 Nev. 169, 174, 451 P.2d 848, cert. den. 396 U.S. 916, 90 S.Ct. 239, 24 L.Ed.2d 194 (1969).

The court's discretion in this area, however, is not unbridled. A formal competency hearing is constitutionally compelled any time there is "substantial evidence" that the defendant may be mentally incompetent to stand trial. In this context, evidence is "substantial" if it "raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence." Moore v. United States, supra, 464 F.2d at 666. The trial court's sole function in such circumstances is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. Id. at 666. If such evidence exists, the failure of the court to order a formal competency hearing is an abuse of discretion and a denial of due process. Pate v. Robinson (1966) 383 U.S. 375, 385, 86 S.Ct. 836, 842, 15 L.Ed.2d 815.

Therefore, the State requests that the court immediately make orders for the evaluation of the defendant for the purposes of determining whether the defendant can

reasonably understand the nature of the criminal charges against him, and reasonably assist his counsel in the preparation of his defense.

CONCLUSION

Based on the foregoing facts and law, the State requests that the proceedings be immediately suspended, and that the issue of the defendant's competence be properly resolved.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Confession of Judgment and Order

CODE 3370
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

ORDER OF ENTRY OF JUDGMENT

The within Confession of Judgment having this day been presented to me and having been found sufficient,

IT IS ORDERED that judgment be entered forthwith against and in favor of:

1. in the amount of $;

2.

3.

and interest thereon from , as provided by NRS 99.040 and $24.00 costs as provided by NRS 17.110.

Dated this _____ day of _____, .

_____

DISTRICT JUDGE

CODE 1455
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

CONFESSION OF JUDGMENT

[NRS 17.090]

I, the above-named , hereby confess judgment in favor of for the sum of $ and do hereby authorize Judge of the Second Judicial District Court to enter judgment for such sum against me, , and in favor of , upon this confession.

This confession of judgment is for money justly due to arising from the following facts:

1. That on or between

2.

3.

4.

DATED this _____ day of _____, 1999.

.

VERIFICATION

I, am the defendant in the above action. I have read the foregoing document and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this _____ day of _____, .

CODE 2545
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

ENTRY OF CONFESSION OF JUDGMENT

[NRS 17.110]

The court having ordered that judgment be entered by the clerk of the above-entitled court in accordance with the Confession of Judgment of the defendant, , and the same having been filed,

Now, therefore pursuant to such order, it is adjudged and decreed:

That the victim, , have and recover from defendant, , the sum of

$ together with interest as provided by NRS 99.040 and

$ costs as provided by NRS 17.110.

DATED this _____ day of _____, .

AMY HARVEY
Clerk of the Court

By _____
Deputy Clerk

Confession Written Bruton Redaction

CODE 3370
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

ORDER OF ENTRY OF JUDGMENT

The within Confession of Judgment having this day been presented to me and having been found sufficient,

IT IS ORDERED that judgment be entered forthwith against and in favor of:

1. in the amount of $;

2.

3.

and interest thereon from , as provided by NRS 99.040 and $24.00 costs as provided by NRS 17.110.

Dated this _____ day of _____, .

_____

DISTRICT JUDGE

CODE 1455
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

CONFESSION OF JUDGMENT

[NRS 17.090]

I, the above-named , hereby confess judgment in favor of for the sum of $ and do hereby authorize Judge of the Second Judicial District Court to enter judgment for such sum against me, , and in favor of , upon this confession.

This confession of judgment is for money justly due to arising from the following facts:

1. That on or between

2.

3.

4.

DATED this _____ day of _____, 1999.

_____

.

VERIFICATION

I, am the defendant in the above action. I have read the foregoing document and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this _____ day of _____, .

_____

CODE 2545
Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

ENTRY OF CONFESSION OF JUDGMENT

[NRS 17.110]

The court having ordered that judgment be entered by the clerk of the above-entitled court in accordance with the Confession of Judgment of the defendant, , and the same having been filed,

Now, therefore pursuant to such order, it is adjudged and decreed:

That the victim, , have and recover from defendant, , the sum of

$ together with interest as provided by NRS 99.040 and

$ costs as provided by NRS 17.110.

DATED this _____ day of _____, .

AMY HARVEY
Clerk of the Court

By _____
Deputy Clerk

Complete Story of the Crime

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

ANALYSIS

> Nevada's res gestae rule is embodied in NRS 48.035(3):
> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

Under the Complete Story of Crime Doctrine, the evidence of other crime(s) may be introduced at trial when the other crime(s) is/are interconnected to the act in question such that a witness cannot describe the act in controversy without referring to the other crime(s). Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992); vacated 114 S.Ct. 1280 (1994); modified 113 Nev. Adv. Op. 6 (January 3, 1997). The State is entitled to present a full and accurate account of the circumstances of the commission of a crime, and if such an account also implicates the defendant in the commission of other crimes, the evidence is nevertheless admissible. Kelly v. State, 108 Nev. 545, 550, 837 P.2d 416 (1992); Brackeen v. State, 104 Nev. 547, 553, 763 P.2d 59 (1988).

Even if the evidence were not admissible as part of the res gestae, it is nonetheless admissible pursuant to NRS 48.045(2) which provides the following:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The use of the words "such as" makes it clear that the above list of theories is illustrative only and not exhaustive.

Under NRS 48.045(2), evidence of a prior bad act is admissible if (1) the prior act is relevant to the crime charged: (2) the prior act is proven by clear and convincing evidence; and

(3) the evidence is more probative than prejudicial. See, Felder v. State, 107 Nev. 237, 240, 810 P.2d 755 (1991); Berner v. State, 104 Nev. 695, 697, 765 P.2d 1144 (1988).

NRS 48.015 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

Many cases support the proposition that prior acts evidence should, whenever possible, be presented in the State's case-in-chief. U.S. v. Smith Grading and Paving, Inc., 760 F.2d 527, 531 (4th Cir. Ct. of App. (1985)).

CONCLUSION

If the Court deems the aforementioned evidence admissible as res gestae, then no Petrocelli hearing will be required. If, however, the Court concludes that said evidence is not admissible pursuant to the res gestae rule, then the State would request that a Petrocelli hearing be conducted to determine the admissibility of the prior bad act evidence pursuant to NRS 48.045(2).

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Confession Intoxicated Suspect Miranda

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Once a suspect has been apprised of his Miranda rights, he must affirmatively waive them prior to being interrogated. Stringer v. State, 108 Nev. 413, 417 (1992). The State need only prove that he waived his Fifth Amendment rights against self-incrimination by a preponderance of the evidence. Colorado v. I Connelly, 479 U.S. 157, 168, 107 S.Ct. 515, 522 (1986); Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972); Scott v. State, 92 Nev. 552, 554 (1976)

The validity of the waiver must be determined in each

> case through an examination of the particular facts and circumstances surrounding that case including the background, experience, and conduct of the accused. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981); Rowbottom v. State, 105 Nev. 472(1989)

In citing Falcon v. State, 110 Nev. 530 (1994), Matter goes far beyond the holding of the Court to support his position. In that case, Falcon's conviction was affirmed and the Court held that defendant's waiver of his Fifth Amendment rights was knowingly and intelligently made. Falcon claimed that due to his ingestion of drugs prior to arrest the waiver could not have been knowingly and intelligently given.

After pointing out that the validity of a waiver must be decided on a case-by-case basis and the State must prove it by a preponderance of the evidence, the Court cited Stewart v. State, 92 Nev. 168, 170-171 (1976), for the proposition that,

"Mere intoxication will not preclude the admission of defendant's statements unless it is shown that the intoxication was so severe as to prevent the defendant from understanding his statements or his rights."

The Nevada Supreme Court in Falcon v. State, su~ra,
cited to an Arizona Supreme Court case in which the admission of
defendant's statements were upheld even though he had a 0.24
percent blood alcohol level. See State v. Clark, 517 P.2d 1238,
1240 (1974)

In Anderson v. State, 109 Nev. 1129 (1993), the defendant claimed his waiver was not knowingly and intelligently made due to the fact that his blood alcohol level was 0.088 percent, he was only twenty-six years old, had no experience with the criminal justice system, and at the time was being treated in the hospital for head injuries sustained in a serious traffic accident which resulted in three deaths. The Supreme Court disagreed noting in part that the defendant was responsive to the questions asked and aware of the importance of his statements. Therein, the Court cited the case of State v. Rivera, 733 P.2d 1090, 1096 (Ariz. 1987), in which the defendant was clearly intoxicated yet found to have intelligently and knowingly waived his Miranda rights.

Thus, it is clear that although Notter wants this Court ~o believe that intoxication precludes a knowledgeable and intelligent waiver of a constitutional right, this is simply not :he law. In fact if it was, no DUI suspect or user of a
controlled substance or even a prescription drug could ever be properly interviewed or consent to a search.

A confession obtained while under the influence of narcotics is governed by much the same rule as a confession made under the influence of intoxicating liquors. The effect of narcotics relate generally to the credibility to be given the confession, rather than its admissibility. 23 C.J.S. Crim. Law. §828, p. 228.

The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. The Miranda warnings insure that a waiver of these rights is knowing and intelligent by fully advising the suspect of this constitutional privilege, including the critical advice that whatever he chooses to say may be used against him and that he has the right to remain silent and have counsel present.

Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he knew he could stand mute and have the assistance of counsel, and that he was aware of ~he State's intention to use his statements against him, the analysis is complete and the waiver is valid as a matter of law. "Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135 (1986)

In Colorado v. Connelly, supra, the United States Supreme Court overturned a Colorado Supreme Court's decision upholding the trial court's suppression of defendant's statements as not being a product of a "rational intellect and free will." The State courts had ruled that Connelly's impaired mental ability (psychological) precluded his ability to make a valid waiver of his Miranda rights.

Unlike the instant matter, this case revolves solely around the issue of the voluntariness of the defendant's statements, and the Court in finding them to be voluntary made the following statement, "Only if we were to establish a brand new constitutional right - - the right of a criminal defendant to confess to his crime only when totally rational and properly motivated -- could respondent's present claim be sustained." 479

U.S. 1GG, 107 S.Ct. 521.

> Proof that the accused was intoxicated at the time he made the statement will not, without more, prevent the admission of his statement.

> Before such a statement will be held to be inadmissible, it must be shown that the accused was intoxicated to such an extent that he was unable to understand the meaning of his comments. Of course, the jury may consider intoxication in determining whether the statements are true or false. (Citations omitted) . State v. Hicks, 649 P.2d 267, 275 (Ariz. 1982) (Upholding admissibility of defendant's statements in spite of a 0.26 percent blood alcohol level, some difficulty answering questions and inability to remember his address).

In State v. Clark, 434 P.2d 636, 639 (Ariz. 1967), the Court upheld the admission of defendant's statements made while he was intoxicated and had a 0.38 percent blood alcohol level, stating, "certainly any man who can manufacture the excuse that bloodstains on a shirt came from his wife's mouth after having her teeth pulled has the control over his mental faculties to understand what he is saying."

In U.S. v. Short, 947 F.2d 1445 (10th Cir. 1991), the defendant was interviewed following an apparent waiver of his Miranda rights. He had been in a serious motorcycle accident nine days before and hospitalized for five days. He was still in numerous casts for broken bones and had one hundred facial stitches. He was on doctor-prescribed Percodan and Hydracodeine f or the pain. Defendant claimed he was in a great deal of pain, drowsy, relaxed and would often forget where he was. The officers acknowledged he looked like he was in pain, "but he never stated he was in an over abundance of pain whatsoever."

Confession Mental Coercion Voluntariness Full Discussion

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

In the line of *cases* dealing with confessions extracted by beatings and other forms of physical and psychological torture, the United States Supreme Court has held that such statements could not be used to secure a conviction if they were "procured by means revolting to the sense of justice. Miller v. Fenton, 474 U.S. 104, 109, 106 S.Ct. 445, 449 (1985), citing Brown v. Mississippi, 297 U.S. 278, 289, 56 S.Ct. 461, 465 (1936)

Such interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. Ibid.

The high court has continued to measure such questions

> involving the voluntariness of the statements under due process considerations rather than the Fifth Amendment privilege against compulsory self-incrimination. Miller v. Fenton, supra., at 474, U.S. 110, 106 S.Ct. 449; Mincey v. Arizona, 437 U.s. 385, 402, 98 S.Ct. 2408, 2418 (1978); Michigan v. Tucker, 417 U.S. 433, 442, 94 S.Ct. 2357, 2362-2363 (1974)

Thus, we are not here concerned with whether defendant exercised a knowing and intelligent waiver of a Constitutional right such as that provided by the Fifth Amendment, but merely whether her statements to the police were made voluntarily. ~ Michigan v. Tucker, supra, at pp. 443-444. Voluntariness must be examined by viewing the totality of the circumstances surrounding the statement. Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 1424 (1969).see also, Miller v. Fenton, supra. In dealing with psychological pressures it is clear that in order to be

deemed an involuntary statement, the "mental coercion" exerted upon the individual must be such that it causes his/her will to admit, deny or remain silent to be overborne. In addition, the coercion which prevents the exercise of a free will must be the result of state action. Confessions prompted by mental or emotional conditions which prevent the exercise of free will but are not the result of official coercion are admissible. Colorado V. Connelly, 479 U.S. 157, 107 S.Ct. 515 (1986) . An involuntary confession means a coerced confession. Arizona v. Fulminante, 499, U.S. ____, 111 S.Ct. 1246 (1990); Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274 (1960) . "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law ... mere examination of the confessant's state of mind can never conclude the due process inquiry." Colorado v. Connelly, supra.

Such statements are so untrustworthy and reprehensible to our system of justice that they cannot even be used for impeachment to contradict defendant's testimony at trial. See Mincey v. Arizona, supra.; ~ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) (statements obtained in violation of one's Miranda rights may still be used to impeach)..

In Pagan v. Keane, 984 F.2d 61 (2nd Cir. 1993), defendant claimed his confession was coerced due to the fact that he had just been shot by police, had undergone four hours of emergency surgery, lost a large amount of blood and suffered injury to his stomach, pancreas and intestines. Hospital personnel first told police that Pagan was in no condition to talk to them. The officers returned within twenty-four hours of the initial surgery and were allowed to speak with defendant, who then had numerous tubes and catheters hooked up to him, was required to wear an oxygen mask, had a high fever and was under the influence of morphine.

Defendant's Motion to Suppress at trial was denied and this was later affirmed by the State Appellate Court. On federal habeas the Second Circuit Court of Appeals said, "We cannot conclude that the finding of voluntariness was in error" based in part upon evidence of the officer's testimony that the defendant appeared weakened yet "very alert and able to answer all our questions with no problem."

A leading case in this area is Mincey V. Arizona, supra, in which the United States Supreme Court found defendant's statements to be involuntary. Mincey was recognized by the Court in Pagan v. Keane, supra, but is distinguishable in its facts. When interrogated, Mincey was confined in the intensive care unit having just been shot by police. He was in and out of consciousness (almost to the point of a coma) and encumbered by tubes, needles and a breathing apparatus. His pain was unbearable and he also repeatedly asked that the questioning cease until he could get a lawyer. Many of his answers were incoherent. The Court found him to be "at the complete mercy" of the detective and "unable to escape or resist." /

The Ninth Circuit Court of Appeals in U.S. v. George, 987 F.2d 1428 (1993), also distinguished Mincev v. Arizona, supra, in rendering a de novo finding of voluntariness identical to the lower court's ruling. The court stated,

> quite unlike this case, Mincey was unable to speak ... and had to communicate by writing on pieces of paper. He repeatedly asked that the interrogation be stopped until he could get a lawyer, but the police refused and continued their questioning. Finally, some of Mincey's answers were incoherent and he lost consciousness several times during the interrogation. Thus, the factors that led the Supreme Court to conclude that Mincey's 'will was simply overborne' are not present here. 987 F.2d 1431 (citations omitted).
>
> In U.S. v. George, supra, the suspect was first encountered by police in the hospital emergency room suffering from a heroin overdose. He was questioned nonetheless and his condition did not stabilize until four hours later. However, the Court found his statements to be voluntary and stated,
>
> George was coherent, gave responsive answers to [the officer's] questions, and was able to remember accurately his motel and room number. Although George

> was undoubtedly in critical condition at the time, his injuries did not render him unconscious or comatose. Finally, nothing in the record suggests that [the officer] sought to take advantage of George's weakened condition: he asked simple questions, kept the interview short, and did not receive any indication from George that he wanted a lawyer before he answered any more questions.

The Court went on to find that George had the capacity to consent to a search of his motel for these same reasons and again found no error in the District Court's ruling regarding voluntariness of consent.

In U.S. v. Lewis, 833 F.2d 1380 (9th Cir. 1987), the Court overturned the lower court's ruling of involuntariness due to the effects of heroin and a hospital-administered general anesthetic. The trial judge had made these statements:

> Now, anybody that has ever been under a general anesthetic following an operation knows that as you come out of a general anesthetic you are not accountable for what you say and do ... So, I cannot find that a person who is both withdrawing from heroin and coming out from under a general anesthetic and is under arrest and confront by FBI agents is in a position to make a voluntary and knowing statement at that time.
> The Court of Appeals reviewed the lower court's findings de novo "under the clearly erroneous standard" and overturned, stating,
>
> Lewis's statements on October 21, 1986, were not incredible nor unresponsive. Instead, her answers demonstrated her capacity to understand what was said to her and to respond truthfully. Our independent review of the record has convinced us that Lewis's October 21, 1986 statement was voluntary.

The court reiterated that the officer's conduct also was not coercive.

In U.S. V. Martin, 781 F.2d 677 (9th Cir. 1985) , the defendant suffered injury in a bomb explosion. He relied on Townsend V. Sam, 372 U.S. 293, 83 S.Ct. 745 (1963) (as does defendant Kent in the instant matter), and Mincey v. Arizona, supra, contending because he was in great pain and under the influence of Demerol, a pain-killing medication, his statements were not the product of his free will and rational choice.

The Court specifically found the facts of both these cases to be inapplicable, stating,

> Martin's injuries, while painful, did not render him unconscious or comatose. Moreover, Martin said that he wanted to talk to the officers and was not reluctant to tell his story.
> The Court also determined that:
> Martin was awake and relatively coherent When Martin became too groggy to understand the detective's questions, Detective Schindler terminated the interview. There is no evidence of extended and oppressive questioning.

Thus, voluntariness is measured in terms of whether the statement "was the product of a free and deliberate choice rather than from intimidation, coercion, or deception." See Collazo v. Estelle, 940 F.2d. 411 (9th Cir. 1991) . This standard requires an uncoerced choice that does not require any requisite level of awareness, intellect or comprehension. Ibid.

The awareness, intellect or comprehension test is reserved for suspects in custody who waived their Miranda rights under the Fifth Amendment. Such a waiver of the important constitutional right requires not only voluntariness but also a knowing and intelligent choice. See Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141 (1986); Collazo v. Estelle, su~ra. Kent clearly is in error when she infers that she must "fully appreciate the significance" of her choice or be exercising comprehension of her statement to be voluntary under the Due Process Clause.
In Moran v. Burbine, supra, the Court indicated that voluntariness of the Miranda waiver was not at issue because there is no suggestion that police resorted to physical or psychological pressure to elicit the statements. Thus, no intimidation, coercion or deception existed and defendant made a 8 free choice. At issue was merely whether Burbine understood and had knowledge of his rights such that he could make an intelligent decision to waive them.
This is a serious flaw in the underpinnings of defendant's

argument and why we see such an apparent clash between the very recent case law cited herein and that cited by defendant. For instance, defendant fails to appreciate that her cited case of Reddish v. State, 167 S.2d 858 (Fla. 1964), which notably pre-dates Miranda, involved a murder suspect who was clearly under arrest and had shot himself in the chest prior to questioning. Although the Court acknowledged that, generally a confession obtained while under the influence of narcotics is governed by much the same rule as a confession made under the influence of intoxicating liquors. Ordinarily, the cases indicate that the effect of narcotics relate generally to the credibility to be given the confession, rather than its admissibility. 23 CJS Crim. Law §828, p. 228, it went on to conclude that if Reddish could not "fully appreciate the significance of his admissions," that the confession would not be consistent with [Fifth Amendment] constitutional standards against compelled self-incrimination. Obviously, the Court could not and did not make a voluntariness determination under the Due Process Clause of the Fourteenth Amendment.

Thus, a proper inquiry in this case is whether Kent, due to any deficient mental or physical conditions, was particularly susceptible to police coercion. However, this Court is not concerned with whether she knowingly or intelligently spoke to police or waived her rights. The voluntariness standard applies equally to both the Fifth and Fourteenth Amendments, however, the knowing and intelligent waiver test is reserved to

Fifth Amendment concerns.

In U.S. v. Short, 947 F.2d 1445 (10th Cir. 1991), the

defendant was interviewed following a waiver of his Miranda rights. He had been in a serious motorcycle accident nine days before and hospitalized for five days. He was still in numerous casts for broken bones and had 100 facial stitches. He was on doctor-prescribed

Percodan and Hydracodeine for pain.~ Defendant claimed he was in a great deal of pain, drowsy, relaxed and would forget where he was. The officers acknowledged he looked like he was in pain "but he never stated he was in an over abundance of pain whatsoever." In addition, defendant was concerned about his eleven-year-old daughter who was being detained in handcuffs for hours and crying. Defendant indicated what was happening to his daughter was "hurting me inside," that she "had nothing to do with it," and his main concern was for her well-being.

Defendant claimed that "the physical pain factor and the taking of drugs should itself eliminate any finding of voluntariness of his statements." He further asserted there could be no question his statements were coerced if his physical condition is considered along with the psychological pressure he suffered because of his daughter.

Defendant brought his claim under the voluntariness prong of the Fifth Amendment - - whether his waiver was coerced. The trial Court, as well as the de novo Appellate Court review, found that defendant's waiver was not only voluntary, but also knowingly made. The Court stated at p. 1450,

> without condoning the detention of defendant's eleven-year-old daughter in handcuffs or the questioning of defendant without inquiry into his ability to respond despite his visible pain,(the record supports admissibility of the statements ... In addition, defendant never told his questioners that he felt too ill, or groggy to answer questions.

Intoxication and fatigue do not automatically render a confession involuntary; rather, the test is whether these mental impairments caused the defendant's will to be overborne. U.S. v. Casal, 915 F.2d 1225 (8th Cir. 1990).

Defendant Was Not In Custody

Custodial interrogation necessitating the rendition of Miranda warnings requires a deprivation of a person's freedom in a significant way. Oregon v. Mathiason, 429 U.S. 492, 494, 97 S.Ct. 711, 713 (1977).

In Oregon v. Mathiason, supra, defendant was a parolee who voluntarily gave an interview to police at the police station upon their request. At the close of the interview, defendant left without hindrance. The Court stated,

It is clear from these facts that Mathiason was not in custody or otherwise deprived of his freedom in any significant way,

even though Mathiason and the officer sat in the confines of a small office with the door closed.

In California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517 (1983), upon virtually identical facts as those found in Oregon v. Mathiason, su~ra, the Court held that a non-custodial situation is not converted into one in which Miranda applies simply because the questioning took place in a coercive environment such as the police station. The police are required to give Miranda warnings only "where there has been such a restriction on a person's freedom as to render him in custody." The Court noted,

> the very practical recognition that any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime.

The Court also acknowledged that Beheler was emotionally distraught and had been drinking, yet reversed a lower court's finding of the custodial status.

The defendant in U.S. v. Martin, supra, was also deemed not to be in custody even though he was in severe pain from the bomb blast and under the influence of Demerol.

.0

Unlike the facts in Mathiason and Beheler, Kent was not even a suspect to a known crime at the time of the interview. As such, police were not even interrogating. ~. Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980) . Both prongs of Miranda's "custodial interrogation" must be met before Miranda warnings are triggered.

Confessor Privilege

CODE 2650
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION IN LIMINE RE:
CONFESSOR/CONFESSANT PRIVILEGE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and Deputy District Attorney, and offers its Opposition to the Motion in Limine Re: Confessor/Confessant Privilege filed by defendant on January 21, 2000.

This Opposition is based upon the following Points and Authorities and the pleadings and papers on file herein.

POINTS AND AUTHORITIES

FACTS

ARGUMENT

NRS 49.015(1) provides that:

> Except as otherwise required by the constitution of the United States or the State of Nevada, and except as provided in this title are title fourteen of NRS, no person has a privilege to:
> (a) refuse to be a witness;
> (b) refuse to disclose any matter;
> (c) refuse to produce any object or writing; or
> (d) prevent another from being a witness or disclosing any matter or producing an object or writing.

The above-quoted NRS section clearly adopts the long-accepted premise that privileges are creatures of statute. Absent an express statutory provision, no privilege applies. NRS 49.015. Privilege statutes are to be strictly and narrowly construed because they inhibit the truth-finding function. United States v. Nixon, 418 U.S. 683, 710 (1974).

> A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness **as to any confession made to him in his professional character.** (Emphasis added).

It is well settled that where the statement is not made in a **confidential setting**, no privilege will apply. See, McNair v. Eighth Judicial District Court, 110 Nev. 1285, 1289 (1994), citing, Lieu v. Breen, 640 F.2d 1046, 1049 (9th Cir. 1981); Delaney v. Superior Court, 50 Cal.3d 785 (1990); see also, United States v. Bernard, 877 F.2d 1463, 1465 (10th Cir. 1989) (voluntary disclosure of a confidential communication to a third party waives any privilege).

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Confrontation Right to Sixth Amendment

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. The right of confrontation is applicable to the states. Roberts v. Russell, 392 U.S. 293 (1968); Pointer v. Texas, 380 U.S. 400 (1965). Obviously, a face to face confrontation is the core value of the right. Introduction of a confession of a codefendant implicating another defendant violates a person's right of confrontation when the confessing defendant exercises his Fifth Amendment Right not to testify. A jury instruction telling a jury not to consider the codefendant's confession against another defendant does not cure a confrontation violation. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 476 (1968).

However, the use in a joint trial of a confession of a codefendant, who does not testify, which has been edited to remove all reference to the defendant's existence and which becomes incriminatory only through linkage provided by other evidence does not violate the Confrontation Clause so long as the jury is instructed not to use it against the defendant. Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). In Richardson, a joint murder trial involving Marsh and Evans, a confession of defendant Williams was redacted so as to "omit all reference" to his codefendant, Marsh. The statement did indicate that Williams and a third person had participated in the crime. Id. The redacted confession further indicated that Williams and a third person discussed the murder in the front seat of a car as they traveled to the victims house. There was no indication in the statement that Marsh was in the car. Id. The United States Supreme Court held that: "...the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the codefendants name, but any reference to his or her existence." Id., at p. 211.

The Supreme Court of the United States revisited this issue in Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998). Defendants Bell and Gray were indicted for the murder of Stacy Williams and they were tried jointly. Bell confessed to the crime and his confession implicated Gray. A redacted version of the confession was read to the jury by a detective and whenever the name of Gray or a third person appeared the detective said "deleted" or "deletion". The Court held that this confession which substituted blanks and the word "deletion" for Gray's name fell within the protective rule of Bruton. Id. 118 S.Ct. at 1157. The law does not require that statements be redacted so as *not to incriminate inferentially*. In endorsing this concept, the Gray Court stated, "We concede that Richardson placed outside the scope of Bruton's rule those statements that incriminate inferentially." 481 U.S., at p. 208, 107 S.Ct., at pp. 1707-08.

The Ninth Circuit in following the mandates of Gray, has held that a redaction of a statement replacing the codefendant's name with "person X" is also violative of the Bruton rule. United States v. Peterson, 140 F.3d 819, 822 (9th Cir.1998). Likewise, replacing a defendant's name with "someone who worked at FDA ... getting ready to retire" was error pursuant to Bruton. United States v. Gilliam, __ F.3d __, 1999 WL 74145, (9th Cir. 1999).

Defendant misreads Gray v. Maryland, supra. Gray does not stand for the proposition that use of a neutral pronoun instead of a defendant's name violates the Confrontation Clause. The violation occurs when the jury can replace blanks or neutral pronouns with the codefendant's name, thus making reference to the other defendant obvious.

Redacted statements are admissible if the redactions are done properly and the Court gives the jury a proper limiting instruction. The rules of redaction set forth in Gray are easily followed in the instant case.

Redactions have been approved (after Gray) using a neutral pronoun or admission that does not facially incriminate or lead the jury directly to a nontestifying declarant's codefendant. United States v. Edwards, 159 F.3d 1117 (8th Cir. 1998). In Edwards, the defendants appealed their convictions and life sentences claiming that their Confrontation Clause rights, as defined in

Bruton and its progeny, were violated by the government's reliance on testimony by numerous witnesses relating each defendant's out-of-court admissions of complicity, and by the district court's refusal to grant either their motions for severance or mistrial. In affirming the convictions the Edwards court stated:

> Defendants argue the government's repeated use of out-of-court admissions that "we" or "they" went to the site to steal, and "we" or "they" set the fire, violated Bruton as construed in *Gray*. [footnote omitted] Neither *Richardson* nor *Gray* discussed the admissibility of confessions in which codefendants' names are replaced with a pronoun or similarly neutral word, as in this case. This court and other circuit courts have consistently upheld such evidence **so long as the redacted confession or admission does not facially incriminate or lead the jury directly to a nontestifying declarant's codefendant**. See *United States v. Jones*, 101 F.3d 1263, 1270 & n.5 (8th Cir. 1996) (use of "we" and "they"); *United States v. Williams*, 936 F.2d 698, 700-01 (2d Cir. 1991) ("another guy"); *United States v. Briscoe*, 896 F.2d 1476, 1502 (7th Cir. 1990) ("we"); *United States v. Garcia*, 836 F.2d 385, 390-91 (8th Cir.1987)("someone"). We conclude the district court's decision to admit nontestifying defendant admissions, redacted as to codefendants by the use of pronouns and other neutral words, and accompanied by appropriate limiting instructions, was consistent with this court's decisions in *Jones* and *Garcia* and the Supreme Court's recent decision in *Gray*."

Id. 158 F.3d 1117, at pp. 1125-26 (emphasis added).

Dated this _____ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By

Deputy District Attorney

Continuance Motion and Affidavit

CODE
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#001510
P.O. Box 30083
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION FOR CONTINUANCE WITH ACCOMPANYING AFFIDAVIT
IN SUPPORT THEREOF

COMES NOW, the State of Nevada, by and through counsel, RICHARD GAMMICK, Washoe County District Attorney, and

, Deputy District Attorney, and hereby offers its Motion to Continue in the above entitled action. This Motion is made pursuant to Hill v. Sheriff, 85 Nev. 234, 452 P.2d 918, 919 (1969) and is supported by the attached memorandum of Points and Authorities, the attached Affidavit of counsel as well as all other papers and pleadings already on file.

DATED this _____ day of _____, 2000.

RICHARD A. GAMMICK
District Attorney

Washoe County, Nevada

By_____

Deputy District Attorney

A F F I D A V I T

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, , do hereby swear under penalty of perjury that the assertions of this affidavit are true.

1. I am employed by the Washoe County District Attorney's Office and have been assigned to represent the State of Nevada in the above entitled case.

2. I learned that Trooper of the Nevada Highway Patrol would be unavailable to testify as a witness on the scheduled trial date of October 29, 1999. He is scheduled to be on vacation.

3. Trooper was the citing officer and the only witness who could testify regarding the defendant's driving pattern.

4. Trooper was under a subpoena that was served on , .

5. This motion is made in good faith and not for the purposes of delay.

_____

Subscribed and sworn to before me this _____ day of , .

_____

NOTARY PUBLIC

ORDER FOR CONTINUANCE

A motion having been made before me by , Deputy District Attorney of Washoe County, and good cause appearing therefor,

IT IS HEREBY ORDERED that the trial scheduled for _____, at the hour of_____ _.m., be continued to the _____ day of _____, 19___, at the hour of _____.

DATED this _____ day of _____, 2000 .

_____

JUSTICE OF THE PEACE

Consent to Search Voluntariness

CODE
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(775) 328-3200
Attorney for Plaintiff
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Court must assess three interrelated areas: 1) The nature of the initial contact; 2) the nature of the subsequent contact and 3) the circumstances surrounding Deputy Meyer's request of the defendant for consent to search.

A. INITIAL CONTACT

Nevada law has categorized three types of contact between police and citizens, namely:

> (1) the 'consensual encounter,' which is completely voluntary and for which a police officer needs no justification; (2) the 'detention,' which is a seizure strictly limited in length, scope and purpose, and for which a police officer must have an articulable suspicion that the civilian has committed or will commit a crime; and (3) the 'arrest,' for which a police officer must have probable cause. Arterburn v. State, 111 Nev. 1121, at 1125, 901 P.2d 668 (1995) (citations omitted).

In Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct., 3138, 82 L.Ed.2d 317 (1984), the U.S. Supreme Court observed that "...the usual traffic stop is more analogous to a so-called Terry[12] stop." Id., 104 S.Ct., at 3150. (Citations omitted). The Berkemer court held that: "The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that person temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda." Id. [Emphasis in original].[13]

B. SUBSEQUENT CONTACT:

"Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he was

---

[12]Terry v. Ohio, 392 U.S. 1, 88 S.Ct., 1868, 20 L.Ed.2d 889 (1968).

[13]Nevada case law has defined "custody" to mean "a 'formal arrest or restraint on freedom of movement' of

willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." Florida v. Royer, 460 U.S. 491 at 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). Our State Supreme Court has held that mere police questioning does not constitute a "seizure" and law enforcement may "randomly without probable cause or a reasonable suspicion approach people in public places and ask for leave to search." State v. Burkholder, 112 Nev.Adv.Op. 74 at 3, 915 P.2d 886 (1996), citing Florida v. Bostick, 510 U.S. 429 at 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

C. CONSENT

Consent to a search or seizure is well-recognized exception to the warrant requirement; an objective test applies to evaluate the reasonableness of the search or seizure. Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). As applied to consent, "Voluntariness is a question of fact to be determined from all the circumstances..." Schneckloth v. Bustamonte, 412 U.S. 227, 93 S.Ct., 2041 at 2059, 36 L.Ed.2d 854 (1973). "Voluntariness is determined by ascertaining whether a reasonable person in the defendant's position, given the totality of the circumstances would fee free to decline a police officer's request or otherwise terminate the encounter.[14] Bostick, supra, 501 U.S. 429 at 434.

Our State Supreme Court has similarly held "to determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. The question in each case is whether the defendant's will was overborne when he confessed." Powell v. State, 113 Nev.Adv.Op. 6, 930 P.2d 1123 (1997), citing Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987). See also, Silva v. State, 113 Nev.Adv.Op. 147, 951 P.2d 591 (1997); Burkholder, supra; Lane v. State, 110 Nev. 1156, 881 P.2d 1358 (1994).[15]

[14]This is the State's burden of proof. See Schneckloth, 93 S.Ct., at 2058.

[15]The State stipulates that defendant Jordan has a legitimate privacy interest in the vehicle and therefore standing. Otherwise, the defendant bears the burden of proof to establish his claim of a sufficient privacy interest. Rawlings v. Kentucky,

The stop was made in a public place and not isolated from public view. Berkemer, supra, 104 S.Ct., at 3149. The intersection of Stead Boulevard and U.S. 395 is well-travelled road even at 2:00 a.m. In addition to the open view surroundings, the defendant was not alone. He did not face the two law enforcement personnel by himself; he was accompanied by his passenger.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

---

448 U.S. 98, at 104, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). See also, Rakas v. Illinois, 439 U.S. 123, 99 S.Ct., 421 at 433, 58 L.Ed.2d 387 (1978); United States v. Singleton, 987 F.2d 1444, 1447 (9th Cir. 1993).

Consensual Encounter Seizure Arrest Objective Test Gamma

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

A. THE DEFENDANT WAS NOT DETAINED BY LAW ENFORCEMENT

The three levels of citizen-police encounters for 4th Amendment purposes have been outlined by our court in Arterburn v. State, 111 Nev. 1121, 901 P.2d 668.

> Courts have acknowledged that there categories of police interactions exist:
>
> (1) the 'consensual encounter,' which is completely voluntary and for which a police officer needs no justification;
>
> (2) the 'detention,' which is a seizure strictly limited in length, scope and purpose, and for which a police officer must have an articulable suspicion that the civilian has committed or will commit a crime; and
>
> (3) the 'arrest' for which a police officer must have probable cause.

Federal law has stated that "Mere police questioning does not constitute a seizure." Florida v. Bostick, 501 U.S. 429 (1991). Further, "Only when the officer by means of physical force or show of authority has in some way restrained the liberty of citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1 (1968). Our State court has considered important factors to be the length of the contact, whether or not the person's exit was blocked, whether or not there was physical contact, the displaying of a weapon or commands or threats. State v. Burkholder, 112 Nev. 535, 915 P.2d 886 (1996).

Because In Stansbury v. California,[16] 114 S.Ct. 1526, (1994) the Supreme Court stated: "We hold, not for the first time, that an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody." Id at 1527. This is in complete accord with our State court's view. In Gama v. State, 112 Nev. 833, 920 P.2d 1010 (1996), our court laid to rest the defense

[16]See State's objections and comments to this court. PHT pp.24,25,[48 (sic)].

complaints about pretextual stops, namely, would an undisclosed, subjective intent of an officer control (for 4th Amendment purposes of suppression of evidence) over an otherwise valid objective basis to effect a stop. Specifically, the court held that the test for 4th Amendment purposes is not what was in the officer's mind, but rather, what objective facts existed. Id., Nev. 836, 837. The law doesn't care what Officer Minick's thoughts were, nor should it. Juries do not care either. What matters however is what objectively was communicated or made known to a reasonable person in the defendant's position.

III. CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Conspiracy Bruton Issues

CODE 2645
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S
MOTION IN LIMINE
RE: CO-DEFENDANT'S STATEMENTS
PURSUANT TO BRUTON

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and Deputy District Attorney, and offers its Opposition to Motion in Limine Re: Co-defendant's Statements Pursuant to Bruton.

This response is based upon the following Points and Authorities and the pleadings and papers on file herein.

POINTS AND AUTHORITIES

STATEMENT OF THECASE

STATEMENT OF THE FACTS

ARGUMENT

At a trial where two defendants are tried jointly, a statement made by one co-defendant may be admitted into evidence so long as it does not refer to, or "facially incriminate" the other co-defendant. Bruton v. United States, 391 U.S. 123, 127-128 (1968); Lisle v. State, 113 Nev. at 692-693.

Additionally, it is universally accepted that the statements made by one co-conspirator are admissible against another co-conspirator, even if the statements expressly incriminate the other co-conspirator, so long as the statements were made during the course of the conspiracy. McDowell v. State, 103 Nev. 527, 529-530 (1987); see also U.S. v. Gypsum, 333 U.S. 364 (1948); U.S. v. Davis, 809 F.2d 1194 (6th Cir. 1987). The courts have consistently held that the admissibility of a co-conspirator's statement is not predicated upon the filing of the conspiracy charge. Cranford v. State, 95 Nev. 471, 473 (1979), citing Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), and Jasch v. State, 563 P.2d 1327 (Wyoming 1977). It is sufficient that the co-conspirators agreed to achieve any unlawful purpose or goal. The Courts have also consistently held that the conspiracy continues during any period of joint flight or escape by the co-conspirators. See, e.g., Gunter v. State, 94 S.W.2d (Tex.); see also State v. Martin, 265 P.2d 297 (Kan.); Fairress v. State, 287 P.2d 708 (Okl.); Meyers v. State, 258 S.W. 821 (Tex.); State v. Winston, 355 N.W.2d 553 (Wis.); People v. Bunner, 43 P.2d 343 (Cal.); Lemley v. State, 117 S.W.2d 435 (Tex.); Reynolds v. Commonwealth, 61 S.W.2d 288 (Ky.); Flores v. State, 231 S.W. 786 (Tex.).

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK

District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Constitutionality of Legislation

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

ANSWERING BRIEF

COMES NOW, RICHARD A. GAMMICK, District Attorney, by and through , Deputy District Attorney of Washoe County, Nevada, and hereby files this Answering Brief requesting the Court deny the Appeal filed in the above-entitled case as the Statute in question is constitutional. This Brief is based upon the grounds set forth in the attached Points and Authorities, all records and pleadings on file and any oral argument the Court should allow.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

1.

STATEMENT OF FACTS

ARGUMENT

THERE IS A PRESUMPTION OF CONSTITUTIONAL VALIDITY

In considering the constitutionality of a duly enacted statute, the Nevada Supreme Court in State v. Eighth Judicial District Court, 101 Nev. 658, 708 P.2d 1022 (1985), stated that appellants bear a heavy burden to overcome the presumption of constitutional validity which every legislative enactment enjoys. In List v. Whisler, 99 Nev. 133, 137-38, 660 P.2d 104, 106 (1983), the Nevada Supreme Court stated that:

> Our analysis ... begins with the presumption of constitutional validity which clothes statutes enacted by the Legislature. Viale v. Foley, 76 Nev. 149, 152, 350 P.2d 721 (1960). All acts passed by the Legislature are presumed to be valid until the contrary is clearly established. Hard v. Depaoli, et al., 56 Nev. 19, 26, 41 P.2d 1054 (1935). [...] Further, the presumption of constitutional validity places upon those attacking a statute the burden of making a clear showing that the statute is unconstitutional. [Citations omitted.]

Moreover, when considering the validity of legislation which is under equal protection and due process attack, the state enjoys a wide range of discretion to make reasonable classifications for enacting laws over matters within its jurisdiction. Graham v. Richardson, 403 U.S. 365, 371 [91 S.Ct. 1848, 1851, 29 L.Ed.2d 534] (1971).

The constitutionality of mandatory helmet laws has been challenged in numerous state courts. See, Love v. Bell, 171 Colo. 27, 465 P.2d 118 (1970). The overwhelming majority uphold, as the Nevada Supreme Court has already held, the constitutionality of the helmet law. State v. Eight Judicial District Court 101 Nev. 658, 708 P.2d 1022.

5.

STANDARD OF REVIEW

When construing the meaning and effect of a statute, the Nevada Supreme Court has consistently held that "[w]here the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." Erwin v. State of Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367 (1995)

The Nevada Supreme Court has articulated a clear test for vagueness challenges. The test is whether the terms of the statute are so vague that people of common intelligence must necessarily guess at their meaning. Sereika v. State, 114 Nev. 142, 955 P.2d 175, 177 (1998) citing Cunningham v. State, 109 Nev. 569, 570 (1993). The rule, however, is not to be applied in a vacuum. The court must consider the actions of the defendant on a case by case basis. A statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808(1954)(emphasis added).

NRS 486.231, states:
The department shall adopt standards for protective headgear ...

At the end of the Statute it states:

CONCLUSION

The State respectfully requests that the Appeal be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Constructive Possession

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

IN THE MATTER OF THE APPLICATION

OF FOR Case No. CR -

A WRIT OF HABEAS CORPUS. Dept. No.

_____/

POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, by and through , Deputy District Attorney of Washoe County, Nevada, and moves the above-entitled Court to enter an order denying the Defendant's petition for Writ of Habeas Corpus.

STATEMENT OF CASE

STATEMENT OF THE FACTS

ARGUMENT

CONSTRUCTIVE POSSESSION

The defendant relies on the holding in Glispey v. Sheriff, 89 Nev. 221 (1973) to support the proposition that the defendant BURT was merely present and not in constructive possession

of the drugs found in the room. The case is distinguished on its facts. The defendant Glispey is alleged to have left drugs in a public washroom at the Nevada State Prison. At least two others had used the washroom and the defendant Glispey did not return to the washroom. The Court held that she had surrendered dominion and control over the drugs and that clearly others could have placed the drugs where they were found. In our case, the defendant BURT was the sole tenant of the room where the drugs were found. He had not surrendered control of the premises or anything that might be found in the room. While there were others in the room, the drugs were found out of sight on the top shelf of the closet.

Possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to her dominion and control. Glispey (supra) The room was the defendant's room. He had immediate access to the drugs. The possibility that someone could steal the drugs or move the drugs without his permission does not mean that he has surrendered dominion and control.

This case may also be distinguished from Marshall v. State, 110 Nev. 1328 (1994) where it was found that several persons had access to the apartment. There was no evidence before the Justice Court that several or three or any people had access to the apartment. There were three guests of the defendant in the room but the defendant cannot be heard to say that they had "access" to the room unless, unlike the Marshall case, they were invited into the room. There is a marked difference between the facts in Marshall and the facts in the instant case.

If the defendant's argument was taken to its logical and absurd conclusion, it could be said that no home owner or tenant has either dominion and control or exclusive accessibility to his possessions the moment he invites someone into his home. That surely is not what the Court meant when it used those words. Even if the accused does not have exclusive control of the hiding place, possession may be imputed if he has not abandoned the narcotic and no other person has obtained possession. Glispey (supra) at 224. In the Marshall case (supra), the defendant was not the tenant and simply stored some personal belongings in his brother's apartment. BURT on the other hand **was** the tenant.

It is necessary to show dominion and control over the substance and that may be shown by direct evidence or circumstantial evidence. Fairman v. Warden, 83 Nev. 332 (1967)

CONCLUSION

A preliminary examination is not a substitute for a trial. As the Court in Marcum v. Sheriff, Clark County, 85 Nev. 175 (1969) states with regard to a preliminary examination:

> Its purpose is to determine whether a public offense has been committed and whether there is sufficient cause to believe that the accused committed it. The State must offer some competent evidence on these points to convince the magistrate that a trial should be held. The issue of innocence or guilt is not before the magistrate. That function is constitutionally placed elsewhere. The full and complete exploration of all of the facts of the case is reserved for the trial and is not the function of the preliminary examination.

The State respectfully submits that this Court can draw any and all reasonable inferences from the facts adduced at the preliminary examination. The State submits that probable cause was established based on all the facts presented before the magistrate.

Based upon the foregoing, it is respectfully requested that this Court enter an Order denying defendant's Petition for Writ a Habeas Corpus.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

By_____

Deputy District Attorney

Constructive Possession II

CODE 3655
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

IN THE MATTER OF THE APPLICATION OF , FOR A WRIT OF HABEAS CORPUS

Case No.

Dept. No.

_____/

POINTS AND AUTHORITIES IN OPPOSITION TO WRIT OF HABEAS CORPUS

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, District Attorney of Washoe County and , Deputy District Attorney and hereby submits the attached Points and Authorities in opposition to defendant's authorities filed . This Opposition is based upon the attached authority, all pleadings and papers on file herein and any argument heard on the matter.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF FACTS

ARGUMENT

A. LEGAL STANDARD

At Preliminary Examination, there must be evidence adduced which establishes probable cause to believe that both an offense has been committed and that the defendant committed it. NRS 171.206. The evidence establishing probable cause may be based on merely slight or marginal evidence because it does not involve a determination of guilt or innocence of an accused. Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996).[17] The State is not required to negate all inferences which might be available as a defense, or explain a defendant's conduct but only to present enough evidence to support a reasonable inference that the accused committed an offense. Brymer v. Sheriff, 92 Nev. 598, 599, 555 P.2d 844 (1976), citing, Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340 (1971).[18] For Writ analysis purposes, "(W)e are not now concerned with the prospect that the evidence presently in the record may, by itself, be insufficient to sustain a conviction." McDonald v. Sheriff, 89 Nev. 326, 327, 512 P.2d 774, 775 (1973).

B. ANALYSIS

The issue here is whether constructive possession of a trafficking quantity of cocaine was demonstrated at Preliminary Hearing. Because of the sworn testimony offered and reasonable inferences therefrom, the State contends that the Justice of the Peace properly determined that probable cause existed to hold the defendant for trial on Counts I and II.

"Possession may be actual or constructive. The

[17]Citing, Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178 (1980). See also, Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340 (1971), citing Marcum v. Sheriff, 85 Nev. 175, 451 P.2d 845 (1969).

[18]Citing Johnson v. State, 82 Nev. 338, 418 P.2d 495 (1966).

accused has constructive possession only if she maintains control or a right to control the contraband...The accused is also deemed to have the same possession as any person actually possessing the narcotic pursuant to her direction or permission where she retains the right to exercise dominion or control over the property." Glispey v. Sheriff, 89 Nev. 221, 510 P.2d 623 (1973), citing People v. Showers, 440 P.2d 939 (Cal.1968).

The essential component of constructive possession is a person who "maintains control or a right to control the contraband." Sheriff v. Shade, 109 Nev. 826, 858 P.2d 840 (1993). This is opposed to "mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding of possession." Sheriff v. Steward, 109 Nev. 831, 858 P.2d 48 (1993) citing Konold v. Sheriff, 94 Nev. 289, 579 P.2d 768 (1978).

While mere presence is insufficient to hold an accused, it is a factor to be considered in the totality of the circumstances offered. An accused's "presence, companionship and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred." Archie v. Sheriff, 92 Nev. 613, 614, 555 P.2d 1233, 1234 (1976). Accord, Edwards v. State, 90 Nev. 255, 524 P.2d 328 (1974). Additionally, two or more persons may have joint possession of a narcotic if jointly and knowingly they have its dominion and control. Maskaly v. State, 85 Nev. 111, 114, 450 P.2d 790, 792 (1969), citing Doyle v. State, 82 Nev. 242, 415 P.2d 323 (1966).

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Corpus Delicti Doctrine

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

IN THE MATTER OF THE APPLICATION

OF FOR

A WRIT OF HABEAS CORPUS.

OPPOSITION TO WRIT

OF HABEAS CORPUS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

CORPUS DELICTI DOCTRINE

The instant petition is an incorrect and somewhat rambling articulation of the doctrine of Corpus Delicti. The first fundamental error that petitioner makes is an assertion that the Corpus Delicti doctrine requires corroboration for each element of a criminal offense. No authority is cited in the instant petition to support the core aspect of the argument. In fact, review of all of the Corpus Delicti doctrine authority cited in the instant petition reveal precisely the fatal defect in petitioner's argument. Specifically, the Corpus Delicti doctrine has not been interpreted to require corroboration based upon the elements of a criminal offense. Merely, the Corpus

Delicti doctrine requires some additional evidence beyond a defendant's confession to sustain a conviction.

The purpose of the Corpus Delicti rule is to assure that the accused is not admitting to a crime that never occurred. The Nevada Supreme Court has held,

> Confessions and admissions of the defendant may not be used to establish Corpus Delicti absent sufficient independent evidence. Hooker v. Sheriff, 89 Nev. 89, 506 P.2d 1262 (1973). Once the state presents independent evidence that the offense has been committed, admissions and confessions may then be used to corroborate the independent proof. Sheriff v. Middleton, 112 Nev. 956, 921 P.2d 282 (1996).

Here, as it is conceded in petitioner's Points and Authorities, the deadly weapon provision is merely a sentencing enhancement and not the corpus or criminal agency of the underlying offense. The petition does not contend that insufficient evidence was presented to

establish the corpus of the underlying acts of robbery and kidnapping. Thus, there is no danger that the defendant's confession is a confession to a false crime.

> The California Supreme Court recently held,
>
> As Jennings and Robbins demonstrate, we have never interpreted the Corpus Delicti rule so strictly that independent evidence of every physical act constituting an element of an offense is necessary. Instead, there need only be independent evidence establishing a slight or prima facia showing of some injury, loss or harm, and that a criminal agency was involved. People v. Jones, 949 P.2d 890, 70 Cal.Rptr.2d 793 (1998).

The Washington Appellant Court addressed the issue as to whether or not identity (a core element of any criminal charge) is part of the Corpus Delicti. They concluded it was not.

> While the state must always prove the identity of the accused, proof of the identity of the person who committed the crime is not an element of the Corpus Delicti. Rather, to establish the Corpus Delicti, the state need only offer proof that someone committed the crime. State v. Nelson, 874 P.2d 170, 177 (Wash. App. Div. 1 (1994)). See also State v. Solomon, 870 P.2d 1019, 1021-22 (Wash. App. Div. 1 (1994) (identity not the corpus of possession of a controlled substance).

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

By_____

Deputy District Attorney

Corpus Delicti Doctrine II

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The defendant argues that the charges in this case must be dismissed because the burden is on the State to prove the *corpus delicti* of the crimes charged beyond a reasonable doubt. The defendant relies on Sheriff, Washoe County v. Middleton, 112 Nev. 956, 921 P.2d 282 (1996) for the proposition that the State may not use the defendant's statement to prove the element of lewdness.

In Middleton, the Supreme Court of Nevada was confronted with a case where the evidence at the preliminary examination did not specifically establish the cause of death of two women whose bodies were found at different locations and times in Washoe County. The Court was confronted with whether or not the State had met its burden of proving that the victims were dead and more importantly and troublesome that their deaths were the result of criminal agency.

> The Court in reviewing this issue held:
> However, at the preliminary hearing stage, probable cause to bind a defendant over for trial "may be based on 'slight,' even 'marginal' evidence because it does not involve a determination of guilt or innocence of the accused." (citations omitted)...the state need only present sufficient evidence '"to support a reasonable inference that the accused committed the offense.'" (Again citations omitted) The same standard applies to proof of the corpus delicti.
> Middleton, 112 Nev. at 961, 921 P.2d at 286.
>
> The Court went on to state on this issue:
>
> Accordingly, we now clarify that at the preliminary hearing stage, the state's burden with respect to the corpus delicti is the same as its burden to show probable cause. The state must present evidence supporting a "reasonable inference" of death by criminal agency.

Again, see Middleton, 112 Nev. at 962, 921 P.2d at 286.

Finally, the Court held that the defendant's confessions and admissions may not be used to establish the *corpus delicti*. However, the Court added:

> Once the state presents independent evidence that the offense has been committed, admissions and confessions may then be used to corroborate the independent proof. (citation omitted) However, all other relevant evidence may be considered. The corpus delicti may be established by purely direct evidence, partly direct and partly circumstantial evidence, or entirely circumstantial evidence. (citations omitted)

Once again, see Middleton, 112 Nev. at 962, 921 P.2d at 286.

Therefore, based on Middleton, supra., the defendant erroneously argues that this case must be dismissed because the State must prove each element of the offenses beyond a reasonable doubt. The standard of proof at the preliminary examination stage is probable cause to believe that the crimes were committed and the defendant committed those crimes.

Further, based again on Middleton, supra., evidence of probable cause can be slight or marginal since the examination does not involve a finding of guilt or innocence by the magistrate or justice of the peace. The evidence presented at the preliminary examination must create a reasonable inference that the accused committed the crime. Likewise, the State must prove the *corpus delicti* by the same reasonable inference standard, not by a beyond a reasonable doubt standard as advanced by the defendant.

In addition, as the Supreme Court of Nevada stated in Middleton, supra., the State does not have to prove the *corpus delicti* beyond a reasonable doubt to sustain the bind over of the defendant for trial at the preliminary examination. Rather, the State may prove the *corpus delicti* by slight or marginal evidence at his preliminary examination in order to sustain Judge Albright's finding of probable cause to believe the crimes were committed by the defendant and his order that the defendant be bound over for trial before this Honorable Court.

IV. CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Counsel Ineffective Assistance

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IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The appellant's Opening Brief offers a plethora of new evidence that was not admitted at trial. Such an attempt to influence the court, and offer new testimony, is not appropriate in these pleadings. NRS 189.050 states that an appeal is to be judged on "the record". The new evidence is not part of the record, and therefore it should not be considered. It should be noted that much of the "evidence" that the appellant refers to is speculative at best, and possibly non-existent.

The appellant appears to state an argument for ineffective assistance of counsel in his OPENING BRIEF. This argument should not be considered as grounds for granting of the proposed Appeal. "To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgement of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so sever that they rendered the jury's verdict unreliable." *See* Strickland v. Washington, 446 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), *cert. denied*, 471 U.S. 1004 (1985)." Lozada v. State, 110 Nev. 349, 353 (1994). Appellant has demonstrated neither prong of the Strickland analysis, therefore this issue should not be considered.

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Counsel Right to for Blood Test

CODE
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IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NO VIOLATION OF THE DEFENDANT'S

SIXTH AMENDMENT RIGHTS

The defendant's Sixth Amendment right to counsel did not attach at the time of his blood test or shortly thereafter. The Nevada Supreme Court in McCharles v. State, Dep't of Mtr. Vehicles, 99 Nev. 831 (1983), found that:

> Such tests are not "critical stages" within the meaning of the sixth amendment of the United States Constitution since the absence of McCharles' counsel during the test will not affect his right to a fair trial. See United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The accuracy of the tests may be established after the test has been given and the driver allowed to contact his attorney.

McCharles v. State, Dep't of Mtr. Vehicles, 99 Nev. 831 at 833-834.

In Robertson v. State, 109 Nev. 1086 (1993), Robertson contended that she was denied her right to counsel because the police officer who arrested her did not contact her attorney so as to arrange independent chemical testing of her blood. The Supreme Court, finding that her contention lacked merit, held that, "Appellant did not inform the police that she desired independent testing. Without such a request, the police are not obligated to facilitate independent testing. Schroeder v. State, Dep't. of Motor Vehicles, 105 Nev. 179, 772 P.2d 1278 (1989)." Robertson v. State, 109 Nev. at 1088. Here there is no assertion by the defendant that he requested an independent test.

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

Washoe County, Nevada

By_____

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Credibility Testimony by Expert Witness

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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Supreme Court of Nevada addressed the issue of use of experts who comment on directly or indirectly on the credibility of another witness in Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987). In that case, the Court allowed an expert on post-traumatic stress disorder patterns in sexually abused children to opine that the witness-victim in that case displayed patterns consistent with having been sexually abused and that in her opinion the witness-victim had been sexually abused. However, the prosecutor went on to ask the expert if she had an opinion as to whether the witness-victim's truthfulness. The expert said yes and detailed the reasons for her opinion without ever indicating what her conclusion was. Basically, the State had the expert indirectly opine that the witness-victim was truthful in her opinion. The Court said, "..., it is generally inappropriate for either a prosecution or defense expert to directly characterize a putative victim's testimony as being truthful or false." See Townsend, 103 Nev. at page 119, 734 P.2d at page 709. The Court went on to say:

> Here, the prosecutor asked the State's expert if she had formed a conclusion to the victim's truthfulness. After responding affirmatively, the expert detailed her reasons for the conclusion she reached *without ever indicating what her conclusion was*. However, the question and the expert's response left no doubt as to her answer. This was improper since it invaded the prerogative of the jury to make unassisted factual determinations where expert testimony is unnecessary. The jury was certainly equipped to weigh and sift the evidence and reach its own conclusion concerning the child's veracity. Although the admissibility of expert testimony is a matter for the sound discretion of the trial judge, (citations omitted) both the prosecutor's question, and hence, the detailed response, should have been excluded.

(Emphasis in the original text) Again, see Townsend, 103 Nev. at page 119, 734 P.2d 709. The Court has made it clear that the issue of credibility of a witness-victim is exclusively the responsibility of the jury. Expert opinions on that issue are not admissible. The State

respectfully contends that Dr. Howle's opinions and statements as cited herein are such inadmissible opinions.

CONCLUSION

DATED this ____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Credit for Time Served

CODE
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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Credit for Time Served. Defendant argues that the time he spent in house arrest prior to his eventual sentencing in his case should be credited to his time served. In support of his position, he cites Grant vs. State, 99 Nev. 149 (1983). In this case, the Supreme Court of Nevada held that the record of trial was devoid of any evidence of restraints imposed during Grant's stay in a residential drug treatment program as a condition of his probation. The Court declined to give him credit for time served as a result. The Court went on to cite cases from other jurisdictions that held that there should be no credit for time served in a residential treatment facility as a condition of probation against the probationer's sentence. From this case, it is clear that the Supreme Court of Nevada would most likely not grant credit for time served against a sentence for time spent in residential drug treatment facilities as a condition of probation. It is highly unlikely that defendant in the instant case was under equal or greater restraint while on house arrest as one who is confined to a residential treatment facility. As set out in defendant's brief, defendant had to contact Court Services on a daily basis. There is no indication that this contact had to be in person or by telephone. Also, he did have to wear an electronic monitoring device. However, it does not appear that the restraint on defendant was such that he should be given credit for time served. Therefore, on the basis of Grant, cited above, the State respectfully requests that this Honorable Court deny his Motion to Amend Judgment of Conviction.

Further, the Supreme Court of Nevada has held that a defendant must be given credit for time served against his sentence for any time spent in county jail. See generally, Merna vs. State, 95 Nev. 144, 591 P.2d 252 (1979). Again, it is clear that the time defendant spent on house arrest is not nearly so restrictive as the time he spent in county jail prior to being placed on house arrest. Defendant received credit for time served in jail, but not for his time spent on

house arrest. This Honorable Court was correct in making those credit for time served determinations.

Additionally, the Supreme Court of Nevada has held that the defendant is not entitled to credit for time served for time he spent on probation prior to revocation and imposition of his underlying sentence to prison. See Van Dorn vs. Warden, 93 Nev. 524, 569 P.2d 938 (1977). Again, there is little evidence to show that the nature and level of restraint defendant in our case had imposed on him during his house arrest was more restrictive than would have been imposed on Van Dorn while on probation.

Moreover, the Supreme Court of Nevada has held that the defendant is not entitled to credit for time served while on house arrest as a condition of his probation. In State vs. Nevada, 109 Nev. 1084, 864 P.2d 294 (1993), the Court held that defendant was not entitled to any credit for time served in residential confinement as a condition of his probation. He was given 120 days in that program as a condition of probation. When his probation was revoked the District Court gave him no credit for time served. The Supreme Court upheld the lower court's decision in this regard.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
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By_____

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Criminal Conduct Multiple Theories

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IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

MULTIPLE THEORIES ARE PERMISSIBLE

The State is permitted to allege multiple theories of criminal conduct. The United States Supreme Court in Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 2499 (1991), held "if a state's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of a crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." As the instant motion correctly states, the Nevada Supreme Court decision recently in Labastida v. State, 112 Nev. 1502 (1996) held that, as a matter of law, child abuse and/or failure to prevent child abuse and/or failure to render medical treatment to said child is sufficient for a conviction of murder.

The Nevada Supreme Court has specifically adopted the logic of Schad in Evans v. State, 113 Nev. Ad. Op. 98 (August 28, 1997). There the court held "[W]e hold that the district court did not error in failing to separately instruct the jury on premeditated murder, a felony murder, and aiding and abetting murder, or to require unanimity on any one of the individual theories of culpability." Thus, the State is only required to put the defendant on notice as to the several different theories that it possesses in this case. It has done so in Count I of the Indictment, therefore, to answer the instant motion's question, the defense should be prepared to defend against all theories as alleged in Count I.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

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Deadly Weapon Pellet Gun

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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The sentence enhancement for the use of a "firearm or other deadly weapon" in the commission of a crime is governed by NRS 193.165. In Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990), our court analyzed NRS 193.165 and substituted the more narrow "inherently dangerous weapon" test in place of the "functional test" to define the term "deadly weapon."[19] The Nevada Supreme court held that "...some weapons can be determined as a matter of law to be inherently dangerous, and thus the only question remaining for the trier of fact is whether the deadly weapon was used in the commission of the crime". Stroup v. State, 110 Nev. 525, 874 P.2d 769 (1994), citing Zgombic, supra, 106 Nev. at 577.

First, the charge as pled in the Information provided the defendant with the requisite notice that a deadly weapon was used in the commission of the murder. The purpose of pleadings is to provide an accused with notice of the charges against him of sufficient specificity to enable him to defend against them. In Hale v. Burkhardt, 104 Nev. 632, 764 P.2d 866 (1988), our court held that the criminal acts that the defendant is charged to have committed, contain a sufficiently 'plain, concise and definite' statement of the essential facts such that it would provide a person of ordinary understanding with notice of the charges." Id at 638.

Here, the defendant was advised that a deadly weapon enhancement was being sought by virtue of the statutory notice in the heading of the charge (NRS 193.165), as well as in

[19]"Inherently dangerous means that the instrumentality itself, if used in the ordinary manner contemplated by its design and construction will, or is likely to, cause a life-threatening injury or death." Zgombic, supra. The former functional test was reinstituted by the Nevada Legislature which redrafted NRS 193.165. It was signed into law on October 1, 1995 as former Assembly Bill 624. Therefore, the controlling law for the offense committed here on August 21, 1994 is the inherently dangerous weapon test.

the body of the charge text ("... by shooting and/or beating in the head"). This is sufficient to provide a person of ordinary understanding that the murder weapon was a gun. A gun is a deadly weapon as a matter of law. NRS 193.165. The jury was provided with the expert testimony of Forensic Pathologist Ellen Clark, M.D. and Coroner Vernon McCarty. Both Dr. Clark and Mr. McCarty opined that the trauma to the head was most consistent with a gunshot wound to the head; primarily due to the radiating fractures and an absence of bone consistent with a bullet track through the skull. Further, the jury made a specific finding that a deadly weapon (a gun) was used in the murder and further, the mechanism was by firing the gun's projectile into the victim's skull.[20] This court heard, considered and denied the defense's oral motion to strike the deadly weapon at the conclusion of the State's case. The defendant's contention has no more merit now that the jurors have unanimously agreed a deadly weapon was used by the defendant to kill Renee Bendus. Stroup, supra, 110 Nev. at 528.

Second, the State and defense jointly agreed upon the submission to the jury of Instruction 34, the law of Zgombic, supra. Further, no objection was subsequently made by the defense at the settlement of instructions.[21]

CONCLUSION

For the reasons above, the State respectfully requests that this court deny the defendant's motion to strike deadly weapon enhancement.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

[20]As opposed to the weapon being used as a club or other manner inconsistent with the inherent purpose and design of a gun.

[21]The court will recall that the original verdict form submitted by the State was revised at defense request. Specifically, the defense requested, without objection that page two include the text: "If your answer is yes please identify the weapon and describe the manner of its use." The jury replied: "The weapon was a gun. The manner was a gunshot to the head."

By_____
Deputy District Attorney

Deadly Weapon Pellet Gun Additional Discussion

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NRS 193.165 sets forth the additional penalty for the use of a deadly weapon in the commission of a crime.

> 1. Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or . . . in the commission of a crime shall be punished by imprisonment in the state prison for a term . . .
>
> 5. As used in this section, "deadly weapon" means: . . .
>
> (c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350. (Emphasis added).

NRS 193.165 sets forth the penalty and then refers the reader to other statutes, specifically NRS 202.265 for a definition of dangerous or deadly weapon.

NRS 202.265 defines a firearm:

> (b) "Firearm" includes:
>
> (2) Any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force.

In this case, the defendant used a bb gun which is spring operated and expels a metallic projectile.

II

NRS 193.165 STATES "A DANGEROUS OR DEADLY WEAPON"

NRS 193.165 subsection 5 states:

> "deadly weapon" means: . . .(c) **A dangerous or deadly weapon** specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350. (Emphasis added).

The legislature defined "deadly weapon" as a dangerous or deadly weapon. The Legislature did not limit the definition to NRS 202.253, a firearm, but instead expanded the definition to include "a dangerous or deadly weapon." This expansion of the definition clearly shows the intent to not limit the enhancement to cases involving firearms.

Clearly a spring operated bb gun is a "dangerous or deadly weapon" as intended by the Legislature.

III

THE LEGISLATURE DID NOT USE THE STATUTORY DEFINITION OF A FIREARM IN NRS 193.165

The Legislature in drafting the additional penalty of "Use of a deadly weapon" did not use the statutory definition of a firearm to define "other deadly weapon". Had the Legislature intended to limit the enhancement it could have used the Statutory definition of a firearm NRS 202.253. However, in NRS 193.165 the Statute specifically states "a dangerous or deadly weapon specifically described in NRS 202.255, 202.265 etc. The Legislature did not intend to limit the definition of deadly weapon to only firearms but to expand that definition by including the five (5) specific NRS provisions that define various dangerous and deadly weapons.

The defense argues that the Court should look to NRS 202.253 for the definition of "firearm" for the purposes of the dangerous or deadly weapon enhancement. As stated above that argument is quite a stretch considering that NRS 202.253 is not even mentioned in NRS 193.165. On the other hand, NRS 202.265 which includes a spring operated bb gun, is specifically included in NRS 193.165.

"It is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally." W.R. Co. v. City of Reno, 63 Nev. 330, 172 P.2d 158 (1946).

In this case, a spring operated bb gun is a dangerous or deadly weapon.

IV

A PELLET GUN IS ALSO A DANGEROUS OR DEADLY WEAPON

Defense counsel repeatedly refers to the weapon as a pellet gun. Even a pellet gun is included within NRS 202.265.

"Any **device** from which a metallic projectile, including any ball bearing or **pellet**, may be expelled my means of spring, gas, air or other force."

CONCLUSION

The deadly weapon enhancement statute, NRS 193.165 defines "deadly weapon" as a dangerous or deadly weapon as specifically described in five (5) statutes. NRS 202.265, utilized in NRS 193.165, holds that a firearm includes a spring operated bb gun. Since the defendant used a spring operated bb gun he is subject to the enhancement for use of a deadly weapon or more specifically "dangerous or deadly weapon. The State therefore respectfully requests that the Motion to Strike be denied by this Honorable Court

Dated this _____ day of _____, .

RICHARD A. GAMMICK
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By_____

Deputy District Attorney

Deadly Weapon Functional Standard

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IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS; AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The "Functional Test" Applies to Deciding Whether A Weapon Is Deadly When Alleged As An Element Of An Offense; Hence, A Cue Ball Is A Deadly Weapon When Alleged As An Element Of Battery With A Deadly Weapon.

Defendant mistakenly cites several cases for the proposition that the "inherently dangerous" test applies to deciding whether a weapon is deadly when alleged as an element of an offense. See Kazalyn v. State, 108 Nev. 67, 76 (1992); Smith v. State, 110 Nev. 1094, 1102 (1994); Hutchings v. State, 110 Nev. 103, 111 (1994). In fact, these cases stand for the principle that the "inherently dangerous" test applies to deciding whether a weapon is deadly for purposes of sentence enhancement pursuant to NRS 193.165.

> NRS 193.165 provides in pertinent part as follows:
> (1) . . . any person who uses a firearm or other deadly weapon . . . in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime . . .
>
> (2) This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact.
>
> (3) The provisions of subsections 1 and 2 do not apply where the use of a firearm, other deadly weapon or tear gas is a necessary element of such crime. [Emphasis added].
>
> (5) As used in this section, "deadly weapon" means:
>
> (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;
>
> (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death . . .

NRS 193.165 changes the rule of law set forth in Zgombic v. State, 106 Nev. 571 (1990), as it pertains to defining deadly weapons for the purposes of sentence enhancement. In Zgombic, 106 Nev. at 573-74, the Supreme Court overruled the decision in Clem v. State, 104 Nev. 351 (1988), only as it pertained to using the "functional test" for the purpose of sentencing enhancement.[22] However, the Supreme Court stated as follows:

> In Clem, we cited several cases in support of the functional test. Some of these cases dealt with the interpretation of a deadly weapon clause in a statute where a deadly weapon was an element of a crime, such as assault with a deadly weapon (fn.2). We have no dispute with these cases which use the functional test to define a deadly weapon when a deadly weapon is an element of a crime. Indeed, that is the interpretation generally followed in Nevada. See Loretta v. Sheriff, 93 Nev. 344, 565 P.2d 1008 (1977). Whether the same functional test applies for purposes of sentence enhancement is a different question, however. Upon reflection, we conclude that interpreting the deadly weapon clause in NRS 193.165 by means of a functional test was not what our legislature intended or what is mandated by statutory rules of construction. Accordingly, we overrule the functional test stated in Clem and substitute the "inherently dangerous weapon" test to determine whether an instrumentality is a deadly weapon pursuant to NRS 193.165.[23] [Emphasis added].

Clearly, when the Nevada legislature decided to change the rule of law set forth in Zgombic, supra, 106 Nev. 571, it chose to apply both the "functional test" and the "inherently dangerous weapon" test for the purposes of sentence enhancement pursuant to NRS 193.165. However, the rule of law in Zgombic, supra, 106 Nev. at 573-74, which requires courts to apply the "functional test" when determining whether a weapon is deadly if a deadly weapon is alleged as an element of a crime, remains the controlling law in Nevada.

---

[22] Under the "functional test," an instrumentality, even though not normally dangerous, is a deadly weapon whenever it is used in a deadly manner. See Zgombic, supra, 106 Nev. at 574-75; see also NRS 193.165(5)(b).

[23] A weapon is inherently dangerous when "the instrumentality itself, if used in the ordinary manner contemplated by its design and construction, will, or is likely to, cause life-threatening injury or death." Zgombic, supra, 106 Nev. at 576-77; see also NRS 193.165(5)(a).

In the case at hand, Wolfe struck Mr. Swing in the head repeatedly with a cue ball. Under the "functional test," a cue ball is an instrumentality, although not normally dangerous, which is a deadly weapon when used as a blunt instrument to repeatedly strike a victim on the head. Clearly, repeated blows to Mr. Swing's head with a solid cue ball could have likely caused a life-threatening injury.

In Archie v. Sheriff, 95 Nev. 182 (1979), the Supreme Court upheld the District Court's determination that the defendant probably committed a battery with the use of a deadly weapon -- a two-by-four piece of lumber. In Anthony Lee R. v. State, 952 P.2d 1 (1997), the Nevada Supreme Court upheld a juvenile court's decision that a charge of battery with a deadly weapon -- a baseball bat -- had prosecutorial merit. Hence, both a piece of lumber and a baseball bat are deadly weapons for the purposes of alleging an element of a crime.

In the case at hand, both a piece of lumber and a baseball bat are similar and analogous to a cue ball in that they are both likely to cause life-threatening injury when used as a blunt instrument to inflict injury on a person's vital areas, i.e., the head. Thus, a cue ball is a deadly weapon for the purposes of alleging battery with a deadly weapon.

Wolfe cites Sheriff v. Gillock, 112 Nev. 213 (1996) for the proposition that the Nevada Supreme Court applied the "inherently dangerous weapon" test when deciding whether a weapon is deadly when alleged as an element of a crime. In Gillock, supra, 112 Nev. 213, the defendant hit an individual with a drinking water glass on the face. Wolfe's interpretation of the decision in Gillock, supra, 112 Nev. 213, is misplaced.

The Supreme Court held that "[t]he state has not shown that the district court erred in finding that a water glass is not a deadly weapon and that the state therefore did not present sufficient evidence to the grand jury to establish probable cause that respondent [defendant] committed a battery with the use of a deadly weapon." Gillock, supra, 112 Nev. at ___, 912 P.2d at 275-76. Thus, the Supreme Court did not rule that a drinking glass is not a deadly weapon when alleged as an element of a crime -- it only upheld the District Court's decision that the state failed to present sufficient evidence to the grand jury on the deadly

weapon issue. Furthermore, the issues before the Supreme Court did not require it to apply either the "functional test," or the "inherently dangerous weapon" test, as Wolfe incorrectly asserts in his Petition for Writ of Habeas Corpus.

The "inherently dangerous weapon" test does not apply in this case since the cue ball is alleged as an element of battery with a deadly weapon -- not as a sentence enhancement. Since the State presented sufficient evidence to the grand jury that the offense of battery with a deadly weapon -- a cue ball -- Wolfe's Petition for Writ of Habeas Corpus must be denied

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Deadly Weapon Inoperative Pistol

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

IN THE MATTER OF THE APPLICATION

OF FOR

A WRIT OF HABEAS CORPUS.

OPPOSITION TO WRIT

OF HABEAS CORPUS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Putting aside the argument stated above, the evidence presented at the preliminary hearing clearly establishes independent evidence of the use of a firearm. As the petition concedes, the witnesses identified the presence of a handgun. Petitioner cites McIntyre v. State, 104 Nev. 622, 764 P.2d 482 (1988), as authority of the requirement to prove the deadly capabilities of a weapon. In fact, McIntyre merely stands for the proposition that a toy gun is not a deadly weapon for purposes of NRS 193.165. McIntyre does not stand for the proposition that a witness must: (1) See the entirety of the weapon, or (2) know its deadly capabilities. The court held,

> We have previously determined that in statutorily distinguishing firearms from 'other deadly weapons,' the legislature, for purposes of sentence enhancement, attributed a firearm a per se deadly status; proof of a firearm's deadly capabilities is not required. We have applied this rational in cases involving blank guns, and firearms which are, in fact, inoperable. McIntyre at 622. (Citations omitted).

In fact, the Nevada Supreme Court addressed a scenario wherein the defendant used an inoperative pistol. In upholding the deadly weapons enhancement, the court stated,

> In order to 'use' a deadly weapon for purposes of NRS 193.165, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of the deadly weapon in aiding the commission of the crime. Culverson v. State, 95 Nev. 433, 596 P.2d 220 (1979). The jury could have found from the evidence presented that the appellant 'used' the pistol in the commission of the robbery, even though inoperative, and that his use of the pistol produced a fear of harm or force in the victims. A firearm is dangerous, not only because it can inflict deadly harm, but because its use may provoke a deadly reaction from the victim or from bystanders. Allen v. State, 96 Nev. 334, 609 P.2d 321 (1980).

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

By_____

Deputy District Attorney

Deadly Weapon Question of Fact for Jury

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Essentially, the defendant argues that both NRS 193.165 and Buff and Pacheco v. State, 114 Nev.Adv.Op. 131 (Dec. 8, 1998) preclude the State from seeking such an enhancement under the facts of this case. The defendant's argument is misplaced.

NRS 193.165(5)(b) specifically provides that a deadly weapon is "Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily of causing substantial bodily harm or death..." (emphasis added). This language has been further interpreted by the Nevada Supreme Court in Stroup v. State, 110 Nev. 525, 874 P.2d 769 (1994). There, the Court noted that "...some weapons can be determined as a matter of law to be inherently dangerous...." However, "...[i]f it is not clear whether the weapon is deadly, the jury must then determine that issue in addition to whether the weapon was used to commit the crime." Id. at 577, 798 P.2d at 551-52.

CONCLUSION

Whether or not the defendant used a deadly weapon in the commission of this crime is a question of fact for the jury. Accordingly, the Court should deny the defendant's motion to strike and/or preclude a deadly weapon enhancement allegation.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
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Washoe County, Nevada

By_____
Deputy District Attorney

Death Penalty Qualifying Jury

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IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE TO MOTION TO AVOID DEATH PRONE JURY

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

COUNSEL'S ENTITLED TO LIFE AND DEATH QUALIFY THE JURY

The United State Supreme Court has stated that a prospective juror whose individual views would prevent or substantially impair, the performance of a juror and their ability to impose the death penalty or a penalty other than death, must be excluded for cause. Adams v. Texas, 448 U.S. 38 (1980); Wainwright v. Witt, 469 U.S. 412 (1985) (emphasis added).

The above-stated provision has been specifically adopted by the Nevada Supreme Court in Aesoph v. State, 102 Nev. 316 (1986). Thus, the State is not in disagreement with the conclusions stated in the instant motion, that is, counsel's entitled to "life" and "death" qualify potential jurors. The key operative language as highlighted above is whether a person's view of the death penalty would "prevent or substantially impair" their performance or the duties as jurors at the sentencing phase of the trial.

In fact, in Aesoph the Court addressed a similar issue as that being brought in the instant motion. The Court held: "Aesoph next contends that the removal for cause of persons of the distinct sizable group, the 'Witherspoon-excludables' i.e., persons who because of their attitudes and belief are unalterably opposed to the death penalty, violated his rights under the Six and Fourteenth Amendments to a jury selected from a representative cross-section of the community." Aesoph, 102 Nev. at 318. The Court went on to hold that "Witherspoon-excludables" are properly removed for cause because their beliefs prevent or substantially impair their ability to perform one of their duties as jurors, to wit, to follow the law. Id. at 318. Concluding the Court held, "[w]e hold that a person's constitutional right to a fair trial is not violated by the removal for cause, prior to the guilt phase of a bifurcated capital trial, of perspective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as duties at the sentencing phase of the trial." Id. at 318.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Death Penalty Juvenile

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION TO PRECLUDE DEATH AS SENTENCING OPTION IN THE EVENT OF CONVICTION FOR FIRST DEGREE MURDER

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and submits its Opposition to Motion to Preclude Death as Sentencing Option in the Event of Conviction For First Degree Murder.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

The instant motion is a nonsensical and superficial analysis attempting to assert that the International Covenant on Civil and Political Rights (hereinafter ICCPR) prohibits the execution of the defendant based upon his age at the time of the offense.

The instant motion concedes that the treaty has not been ratified by the United State. The motion however states, without any support, that the "treaty precludes such reservation". Further, the motion goes on to state that "not withstanding the foregoing, the treaty has been relied upon in subsequent litigation, as though it were in effect." This contention is without citation to authority. This statement is not true and is an attempt to mislead this court and can not be considered in good faith a representation of the law and facts in this case. Further, the State respectfully requests that this court sanction defense counsel for the reckless assertions contained in this motion. The "subsequent litigation" cited in defense counsel's motion will be addressed later in this motion. Citing to the Supremacy Clause in the United States Constitution, the instant motion contends that treaties made by the United States constitute the law of the land. United States Constitution, Article VI. Counsel does not cite to nor attempt to explain how. In the immediate proceeding page of the motion it concedes that the ICCPR was not specifically ratified by the United States on the issue presently before this court. Thus, counsel is attempting to assert the provisions of an international treaty that has not been recognized to effect, prohibit and/or limit the laws in criminal litigation involving the death penalty of defendants in excess of sixteen years of age.

Another example of the attempt to deceive this court is the incredible assertion of the "reference" to the ICCPR in Stanford v. Kentucky, 497 U.S. 361, 109 S.Ct. 2969 (1989). First, the instant motion states that the "treaty is referenced in the case" citing the entirety of footnote 10. What is absent from the citation is that footnote 10 is part of the dissent in that case. Further, counsel fails to explain what relevance "referencing" the treaty in a dissenting opinion has in claiming that it is a prohibition of clearly established law both under the Federal and Nevada State Constitution.

Next, the motion cites to an irrelevant dissenting opinion about why minors should be treated differently. Justice Brennan's version of treating minors differently has been rejected both by the United States Supreme Court and the Nevada Supreme Court. In fact, in a case cited in the instant motion Thompson v. Oklahoma, 487 U.S. 815, 851, 108 S.Ct. 2687, 2707 (1988) it specifically articulates that the vast majority of State and Federal legislatures have lowered the age of juveniles so that they can be properly tried as adults.

Once again, citation to Thompson fails to assist this court with any "analysis" about how the mere mention of a treaty that has specifically not been ratified precludes the execution of an individual who is sixteen at the time they committed the murder. The reference to Thompson fails to indicate that it is a footnote (specifically footnote 34) and the reference sentence states in its entirety: "Juvenile executions are also prohibited in the Soviet Union." Further, the citation set forth in the defense motion is an incomplete reference to footnote 34.

What defense counsel has graced this court with is a word search to determine whether the United States Supreme Court has mentioned the ICCPR and have enlightened this court with the number of times it has been referenced. This portion of the instant motion is utterly devoid of any intelligent analysis that would support even their own motion.

Next, and consistent with the theme presented in this case, counsel cites to Burger v. Kemp, 483 U.S. 76, 107 S.Ct. 3114 (1987). Incredibly, the instant motion says "the court discusses the situation faced by juveniles convicted of murder in Burger v. Kemp. The entirety of the quotation on page six and seven is footnote 5 in the dissenting opinion authored by only two justices of the court, Powell and Brennan. It is disconcerting, to say the least, to have licensed counsel make such a preposterous representation to this court. There can be no reasonable interpretation that the United States Supreme Court "discussed this situation faced by juveniles" in the fashion and in the method of the footnote cited by counsel. Further, counsel fails to inform this court that the citation is: (1) to a footnote, and (2) to a dissenting opinion by only two justices.

Next, the motion cites to the Nevada Supreme Court specifically rejecting the proposition of law that they now assert. Domingues v. State, 114 Nev. 783, 961 P.2d 1279 (1998). The State is at a loss on how to respond to this citation, as the defense offers no "analysis" as to why this court should summarily reject and not follow the analysis set forth by our Supreme Court.

AUTHORITY THAT THE TREATY IS IN EFFECT

The instant motion concludes, by citation to two Ninth Circuit Court of Appeals cases, Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998) and Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996).

First in Martinez counsel fails to inform this court that the case was a civil suit against the United States brought in Federal Court under the Alien Tort Act. Counsel specifically cites with emphasis that the ICCPR was "entered into force for the United States September 8, 1992". Counsel is emphasizing that the ICCPR is in force and effect, yet, they had previously conceded that in the context of the issue of execution of "juveniles" the treaty has not been ratified by the United States. Further, citation to Martinez for the proposition that the treaty is in force and effect in the federal civil action and thus, somehow to be treated in effect for purposes of this issue is misleading, contrary to their own authority and an utter waste of this court and the State's time to respond to a frivolous and meritless motion.

Not surprisingly, the same misleading and absurd assertion is made when one reviews the Hilao case cited by counsel at page 10. Once again, this case involved a civil action for damages brought in Federal Court. Counsel does not even make an effort to "analyze" how these two civil cases can properly be interpreted to enforce a provision of the treaty that has not been specifically ratified.

Finally, the contention set forth at the conclusion of the motion that states: "While the Nevada Supreme Court is determined the Treaty is not in effect the Ninth Circuit has determined that it is." That assertion, is patently false, misleading and without any support in law.

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Defendant's Character Relevance Admissibility Limits

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

MRS 48.045(1) allows the defendant in a criminal case to offer good character evidence, and further authorizes the State to offer bad character evidence to rebut any good character evidence offered by the accused. However, the Nevada Supreme Court has adopted the majority rule that the proof offered by the accused must be confined to the particular traits of character that are relevant to the conduct with which the accused has been charged. Daly v. State, 99 Nev. 564, 571 (1983), citing Freeman v. State, 46 P.2d 967, 972-73 (Alaska 1971) ; State v. AltamiraflQ, 569 P.2d 233, 235 (Arizona 1977); People V. Sexton, 555 P.2d 1151, 1154 (Colorado 1976); State v. Blake, 249 A.2d 232, 234 (Connecticut 1968); State v. Dobbins, 639 P.2d 4 (Idaho 1981); State V. Howland, 138 P.2d 424 (Kansas 1943); Hallengren v. State, 286 A.2d 213, 216 (Maryland 1972); United States v. Angelini, 678 F.2d 380 (1st Cir. 1982); United States v. Hewitt, 634 F.2d 277, 279 (5th Cir. 1981)

CONCLUSION

Diplomatic Immunity

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

This Court ordered that the litigants prepare legal briefs as to whether this Court has jurisdiction over the defendant who is asserting some generalized diplomatic immunity.

The material delivered by the defendant to the State is a rambling, and at times, incoherent historical presentation regarding the claimed sovereign of "Nigritia." Unfortunately for the defendant, the materials are completely devoid of any legal basis to assert that this Court does not have jurisdiction over the defendant. The United States Supreme Court in Boos v. Berry, 485 U.S. 312, 108 S.Ct.Rptr. 1157, 1165 (1988), held that the provisions of the United States Constitution prevail over any international agreement or foreign sovereign laws, rights and/or privileges.

The defendant has failed to cite to any cognizable authority, international or otherwise, that stands for the proposition that the defendant is immune from being hauled into civil and/or criminal courts within the United States. The materials submitted by the defendant, among other things, claim to establish that "Nigritia" is a foreign sovereign and the defendant is a representative of said sovereign. It is unclear from the defendant's materials whether he is asserting diplomatic immunity and/or whether he claims that this Court does not have jurisdiction over any "Nigritian" citizen. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 103 S.Ct.Rptr. 1962 (1983); *See also* Tabion v. Mufti, 73 F.3d 535 (4th Cir. 1996).

Diplomats who injure another person while driving under the influence may be required to leave the United States if they decline to waive diplomatic immunity. David A. Jones, Jr., Diplomatic Immunity: Recent developments in law and practice, 85 Am.Soc.Intl.L.Proc. 251, 264 (April 19, 1991).

THE FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA) DOES NOT PROHIBIT JURISDICTION

> The Foreign Sovereign Immunities Act (FSIA) 28 USC §§1602-1611 (1988) sets forth the terms and conditions of a foreign sovereign being immune from civil and criminal liability.
>
> "According to scholarly commentators, absolute foreign sovereign immunity continued to be the rule until the middle of this century, when in 1952 the state department announced in a letter signed by Jack B. Tate that it would suggest immunity for foreign states' public acts, but would withhold a suggestion for private acts. This more restrictive theory of immunity was, in effect, codified by the passage of the FSIA."

In Re Doe: 860 F.2d 40 (2nd Cir. 1988) (citations omitted).

However, the defendant has failed to establish two critical elements: (1) That "Nigritia" is a recognized sovereign under federal law, and; (2) the defendant is a recognized official within that sovereign foreign country. The mere assertion is insufficient.

In a similar factual case the Tenth Circuit Court of Appeals held that unsupported assertions of diplomatic immunity will not terminate civil and/or criminal litigation. Punchard v. New Mexico, 956 F.2d 278 (10th Cir. 1992).

The court went on to hold "[W]e believe there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law." Id at 45. *See also* Republic of the Philippines v. Marcos, 806 F.2d 344, 360 (2nd Cir. 1986).

Conceding that the previous referenced authority deals with a specified and limited form of diplomatic immunity referred to as "head-of-state immunity," the State would argue that if the head-of-state fails to possess the immunity so does any immunity asserted by the instant defendant.

In Holloway v. Walker, 811 F.2d 263 (5th Cir. 1987) the Federal Circuit Court of Appeals rejected a defense of diplomatic immunity since no legal and/or factual showing of diplomatic immunity existed. In that case, the court rejected the defense's attempt to offer "diplomatic immunity" as a basis to use deadly force.

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Discovery Defendant Statements Witness Statements

CODE 2645
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S MOTION FOR DISCOVERY AND PRODUCTION OF OTHER ITEMS AND INFORMATION

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this Opposition to the defendant's Motion for Discovery and Production of Other Items and Information and Other Relief. This Opposition is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The defendant has moved this Honorable Court for a order for further discovery beyond that ordered on October 4, 1999.

I. DEFENDANT'S STATEMENTS.

Defendant has requested that this Honorable Court order the State to produce any statements made by the defendant in this case. NRS 174.235(1)(a), which was cited by defendant, requires that the State produce to the defendant all written or recorded statements he made. The State has previously provided the defendant with the audio and video tapes of the interview conducted by Washoe County Sheriff's Detective Michael Matthews on July 9, 1999. Therefore, the State respectfully contends that it has complied fully with the statutory discovery requirements clearly set out in NRS 174.235. Further, the State will honor its continuing duty to produce written and recorded statements made by the defendant in this case.

Further, the State respectfully contends that the defendant's request for an order from this Honorable Court pertaining to oral statements of the defendant which have not been recorded or, obviously, written exceeds his statutory rights to discovery. Additionally, the State is always obligated to provide discovery to the defendant of statement he makes in what ever form he may make it, written, oral, recorded or not if such statement constitutes exculpatory evidence for the defendant. See Brady v. Maryland, 83 S.Ct. 1194, 373 U.S. 83 (1963) and Steese v. State, 114 Nev. 479, 960 P.2d 321 (1998). The United State Supreme Court and the Supreme Court of Nevada have made it clear that the State has a continuing duty to provide discovery to the defendant any and all evidence which may be exculpatory. The State will honor that duty throughout this case.

Based on the argument herein above, the State respectfully contends that the defendant has shown no authority for this Honorable Court to order discovery beyond what is permitted by NRS 174.234 and Brady v. Maryland, supra and Steese v. State, supra. Therefore, the State respectfully requests that this Honorable Court not modify its order of October 4, 1999, to include discovery of any oral statements made by the defendant.

II. WITNESS STATEMENTS

The defendant moves for an order from this Honorable Court that the State produce certain witness statements in addition to those required by NRS 174.234(1)(a) which states in pertinent part:

> 1. ..., the prosecuting attorney shall permit the defendant to inspect and to copy or photograph any:
> (a) ..., or any written or recorded statements made by a witness the prosecution intends to call during the case in chief of the state, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;

The defendant argues that as a matter of Constitutional due process, he is entitled to all oral witness statements including the prosecution team's notes of all interviews conducted of all witnesses.

The State respectfully contends that as a matter of Constitutional due process the defendant is entitled to all witness statements, whether oral, written, recorded, or a combination thereof. If such witness statements contain evidence which may be exculpatory. See generally, Brady and Steese, supra. To date, no witness has given to the prosecution team an unrecorded, oral statement containing any exculpatory evidence. If at any time during this case, any and all evidence which may possibly be construed as exculpatory will be discovered to the defendant pursuant to the clear directives set out in these two cases by the Supreme Court of the United States and the Supreme Court of Nevada, respectively.

Additionally, the State contends that requiring the State to discover to the defendant all oral witness statements which have not been recorded and do not contain possible exculpatory evidence is not only not required by either NRS 174.234 or Brady, supra. and Steese, supra., but is a totally unreasonable requirement. If this Honorable Court were to modify its order of October 4, 1999, to include all oral statements as requested by the defendant, the State would have the burden of disclosing all oral interviews, conversations, and contacts with any potential witness at any time prior to trial. This could easily lead to an absurd result. If the prosecutor on the day of trial, just prior to putting the witness on the stand briefly went over her testimony with her, the prosecutor would have to disclose this witness' oral statement made just before going on the stand. Unless she gave any evidence which might be exculpatory, the State respectfully contends that to discover this to the defendant at that time would be absurd. Further, if the State is required to discover to the defendant all written notes taken by the prosecution team of any interview with any witness, the State respectfully contends that the prosecutor could become a witness to those interview notes should any question arise as to what the witness said during this oral interview. Again, that is an absurd, but clearly probable result of the defendant's motion in this regard.

To avoid this result, the State respectfully contends that by providing the defendant with all recorded statements and transcripts thereof and all written statements of all witnesses who may be called by the State, the defendant is now in a position to interview and discover any additional relevant evidence that these witnesses may have in this case. Moreover, since the State discovered all these materials to the defendant in advance of the preliminary examination, the defendant's attorney was clearly able to conduct a probing and detailed cross-examination of all witnesses called by the State. In that regard, the Supreme Court of Nevada has held that, " Furthermore, Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese, 960 P.2d at 331. In that case, the Court held that the defense through diligent investigation could have discovered certain telephone records which the defendant contended

were exculpatory. The same argument can be made in the instant case. With all of the evidence, including written and recorded witness statements, discovered to the defendant to date, he and his able attorney

certainly can conduct a diligent investigation of every aspect of this case.

Based on the legal argument set out herein above, based on NRS 174.234, the State respectfully contends that the defendant is entitled to all statements that are written or recorded of all witnesses the State intends to call in its case in chief. Further, the defendant is entitled to discovery all statements made by any witness in whatever form, if such witness statement contains evidence that might be exculpatory pursuant to Brady, and Steese, supra. Therefore, the State respectfully requests that this Honorable Court deny the defendant's motion to expand the order of October 4, 1999, pertaining to discovery of all witness statements in whatever form.

III. EXCULPATORY EVIDENCE OR INFORMATION LEADING TO EXCULPATORY EVIDENCE

The State has made its position very clear on its continuing duty to provide discovery to defendant of any and all information and evidence which may be exculpatory. Once again, the State will abide by that solemn duty and requirement. The defendant, however, argues that the 6th Amendment's Confrontation Clause requires that the State disclose all witness statements in whatever form and all notes taken by members of the prosecution team during those interviews. The State will not restate its position on this issue in detail. That is set out herein above at paragraph II. Suffice it to say that the State will honor is obligation to provided discovery in accordance with NRS 174.234 and Brady and Steese, supra.

Further, the defendant requires that this Honorable Court order the State to disclose any agreement with or any kind of compensation paid by the State to any prospective witness. Included in this order would be any agreement the State has with any witness concerning disposition of criminal charges pending against that witness. At present, the State has no agreement with any potential witness pertaining to the disposition of criminal charges

pending against that witness. Further, each lay witness will receive the standard, statutory witness fee of $25.00 for testifying at the preliminary examination and for testifying again at the trial.

ACCESS TO ALL ITEMS OF PHYSICAL EVIDENCE FOR THE PURPOSE OF INDEPENDENT EXAMINATION AND TESTING BY QUALIFIED EXPERTS RETAINED BY THE DEFENSE

The State is aware of its responsibility to retain all physical evidence in order to allow the defendant the opportunity to inspect it and to perform any tests on that evidence. Therefore, the State will abide by this obligation in accordance with Crockett v. State, 95 Nev. 859, 603 P.2d 1078 (1979). However, the defendant seeks yet again to place an additional burden on the State by requiring the State to prepare an inventory of all physical evidence in it's possession. This inventory is in addition to all of the information disclosed to the defendant and his counsel through discovery channels. The State respectfully contends that the defendant and his counsel can exercise due diligence in searching through this discovery to determine the physical evidence, if any, that the State has. This procedure is in accordance with the holding in Steese, supra. Based on the legal argument herein above, the State respectfully requests that this Honorable Court deny the defendant's motion in this regard, except as noted.

SCOPE OF THE DISCOVERY ORDER

Based upon the legal argument contained herein, the State respectfully requests that this Honorable Court not expand the order of October 4, 1999, except to the very limited extent discussed herein above as well. Further, the defendant relies on his version of the holding of the Supreme Court of Nevada in Schlafer v. State, 115 Nev. Adv. Op. 25 (1999). He contends that the Court held that the prosecutor has the duty "to promptly search out, obtain and provide to the defense discoverable information and materials." In Schlafer, supra., the State had used a jail house informant who wrote down notes of his conversations with the defendant, Schlafer, while the two were cell mates. In those conversations Schlafer made statements to the effect that he shot the victim because she cut him off in traffic and not based on self defense as

he contended at his trial. Before Schlafer's second trial on the charge of attempted murder, he moved the trial court for an order to have the State produce the jail house informant's notes. The trial court granted that order. The State did not comply with repeated orders from the court to produce these notes until the day the informant testified in the second trial. The Supreme Court of Nevada held:

> Notwithstanding our conclusion that the State's untimely admission of (the informant's) notes did not deprive Schlafer of a fair trial, we nonetheless conclude that the State failed to exercise due diligence in obtaining (the informant's) notes as ordered by the district court.

Schlafer, 115 Nev. Adv. Op. 25, at page 6. The Court went on to chastise the State for its repeated failures to comply with the district court's order to produce notes written by the informant, the existence of which notes was known to the defendant's attorney. The Court did not impose an affirmative and ethical duty on the prosecutor to seek out any and all information and evidence in the case. To be sure, the Court reiterated the State's responsibility to produce any and all evidence which might be exculpatory in accordance with Brady, supra. It should be noted yet again, that this same Court had stated previously that the State is not required to provide evidence which is available to the defendant through other sources including a diligent investigation. See Steese, supra. Therefore, based on both cases, the Court has not relieved the defendant's attorney of his obligation to diligently investigate the case against his client. Nor has the Court placed the prosecutor in the position of the defendant's investigator.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Discovery Non-Compliance Inadvertent

CODE 3785
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Attorney for Appellant

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Appellant,

v. Case No. CR

, Dept. No.

Respondent.

_____/

REPLY BRIEF

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, District Attorney of Washoe County and KRISTIN L. ERICKSON, Deputy District Attorney, and hereby files its Reply Brief.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

A. THE COURT ABUSED ITS DISCRETION IN DECLARING A MISTRIAL AND DISMISSING THE CHARGES DUE TO A DISCOVERY VIOLATION

As discussed in the State's opening brief, the Court clearly abused its discretion in declaring a mistrial and dismissing the charges. Pursuant to State v. Tapia, 108 Nev. 494, 835 P.2d 22 (1992) and its progeny, there is no error justifying dismissal where the State's non-compliance is inadvertent and the court takes appropriate action to protect the defendant. In the instant case, a continuance would have completely protected the defendant's rights, enabled the defendant to have reviewed the document, and enabled the trial to continue and be decided on the merits.

In State v. Stiglitz, 94 Nev. 158, 576 P.2d 746 (1978) the prosecutor was deemed *not* to be guilty of willful or contemptuous disobedience of a court ordered discovery ruling. In Stiglitz, the prosecutor was ordered to produce the confidential informant. Despite the efforts of the prosecutor, the informant was not produced and the judge dismissed the case. The Nevada Supreme Court stated, "...the State having in good faith attempted to comply, we deem it an abuse of discretion to dismiss the charges against respondents. Cf. Finkelman v. Clover Jewelers Blvd., Inc., 91 Nev. 146, 532 P.2d 608 (1975)." Id. at 161-62. Such is the case in the instant matter. The State, in good faith, attempted to comply with All discovery requirements. There was no finding by the Court of bad faith or conscious indifference by the State. Given the facts and circumstances elicited on the record, such a finding could not be made. The State, in good faith, attempted to fully comply with the discovery statute. In fact, it was the Deputy District Attorney's understanding there was full compliance as every piece of paper in the State's file was marked as having been provided to the defendant. Tr.T. 74-5. The District Attorney's Office simply cannot provide that which it does not know exists.

In Dossey v. State, 114 Nev. 904, 964 P.2d 782 (1998) the Nevada Supreme Court held that the endorsement of a lab technician who tested defendant's blood sample for alcohol content as "lab technician," rather than by name was sufficient. The Court stated the name of the technician could have been discovered "with only minimal and reasonable efforts." The Court continued stating,

> In addition, even if the state erred by not previously endorsing Walrath by name, the proper remedy is a continuance, not exclusion of the witness's testimony as Dossey requested. See id. at 234, 828 P.2d at 400; Barker v. State, 95 Nev. 309, 315, 594 P.2d 719, 722-23 (1979). Moreover, we note that Dossey incurred no substantial injury as his attorney was able to conduct a well-prepared and extensive cross-examination of Walrath, even without previously knowing her name. Accordingly, we conclude that the district court did not abuse its discretion.

A continuance is also the proper remedy in the instant case. If the State erred by inadvertently filling to provide the second side of a two-sided document, the proper remedy is a continuance. Just as in Dossey, defense counsel in this case was most certainly capable of conducting, and did conduct, a thorough and extensive cross-examination of the witness. Certainly a continuance would not have prejudiced the defendant in any way. In addition, given the technology of facsimile machines, it is entirely possible the one page could have been faxed to the court, a recess taken, and the trial delayed a brief and reasonable time.

B. THE STATE'S USE OF EXPERT AFFIDAVITS WAS PROPER AND LEGALLY SUFFICIENT

The defendant next asserts the use of affidavits by the State was improper. Such is not the case. In the consolidated appeals of Derosa v. District Court and Thomas v. District Court, 115 Nev.Adv.Op. 33 (1999), the Nevada Supreme Court squarely addresses this issue and clearly states regarding the affidavit admitted to prove the blood-alcohol content,

> ...the blood-alcohol test is a routine test of established reliability. See State Dep't Mtr. Veh. v. Bremer, 113 Nev. 805, 809, 942 P.2d 145, 148 (1997). There can be little question concerning the scientific validity or objective nature of this test.

As a result, the Supreme Court declared the affidavits "sufficiently trustworthy to be admitted over Confrontation Clause objections." Id. The defendant merely makes a conclusory statement that the affidavit does not contain all the information or necessary evidentiary foundation. No where is it stated what the affidavit actually lacks. It is complete and admissible.

Furthermore, the defendant has the right to compel the affiant to testify pursuant to NRS 50.315. The defendant must first establish a substantial and bona fide dispute regarding the facts in the affidavit *and* it is in the best interests of justice that the witness who signed the affidavit be cross-examined 50.315(6). *If* the court so finds, then the court may continue the trial to a time deemed reasonably necessary to receive such testimony. The record contains no such evidence of a "substantial and bona fide dispute" nor any such finding by the judge. As a result, the Confrontation Clause was not violated and the affidavits were properly admitted.

Finally, NRS 50.325 specifically states, "The provisions of this section do not prohibit either party from producing any witness to offer testimony at trial." As a result, if the defendant was not satisfied with the affidavit, he could certainly have called the expert as a witness. He chose not to do so.

C. CONCLUSION

The record is clear there was no willful failure to comply with the laws of discovery by the prosecutor. The violation was absolutely inadvertent and was just as much of a surprise to the prosecutor as it was to the defense. Absolutely no conscious indifference to the defendant's rights was shown by the prosecutor and the defendant in no way has shown he was substantially prejudiced by the absence of one page of a report. As a result, the most severe remedy of dismissal is not justified and a continuance is the appropriate remedy.

The purpose of a trial is to find the truth. A trial allows the facts to be heard and a decision to be made on the merits of a case. To impose the most severe sanction of dismissal based on the absence of one page is a grave injustice. It is a dismissal on a technicality which is the very reason the general public has a distaste for lawyers and the law. Cases should be decided on the merits and not dismissed because someone accidentally forgot to copy the reverse side of a document. In a

perfect world this would not have happened. This is not a perfect world and, fortunately, the occurrence of a missing page is rare.

Based on the foregoing, the State hereby respectfully requests this Honorable Court either reverse any lower court ruling, order or judgment dismissing this case with prejudice, or alternatively, enter its order and judgment that there exists insufficient reason based upon the record below to bar appellant from refiling charges against Respondent in this matter.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Dismissal Criminal Complaint NRS 174.085

IN THE JUSTICE COURT OF RENO TOWNSHIP

IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

* * *

THE STATE OF NEVADA,

Plaintiff, RJC:

v. DEPT:

,

Defendant.

OPPOSITION TO MOTION TO DISMISS

COMES NOW RICHARD GAMMICK, District Attorney of Washoe County, Nevada by and through , Deputy District Attorney of Washoe County and moves this Court for an Order dismissing the defendant's Motion to Dismiss.

FACTS

POINTS AND AUTHORITIES

The defendant begins by arguing that the state may rely on double jeopardy rulings of the Supreme Court as to when a trial begins. The state does so. A trial begins when the first witness is sworn or, in the case of a jury trial, when the jury is sworn.

The defendant then inexplicably argues issues of separation of powers. With all due respect, the one has nothing to do with the other. No one argues that the office of the District Attorney is not part of the executive branch. It is equally clear that the state initiates criminal complaints and, if it sees fit, dismisses criminal complaints.

Prior to the enactment of NRS 174.085 (5), if a case was dismissed by the state, the court invariably added "with prejudice". The legislature saw fit to enact legislation permitting the state one dismissal without prejudice. There are no limitations or conditions placed on the prerogative granted to the prosecution.

It should also be noted that the state is not required to move or request that the complaint be dismissed. NRS 174.085 (5) provides that "the prosecuting attorney, in a case that he has initiated, may **voluntarily** dismiss a complaint". The court's permission to do so need not be sought.

NRS 174.105 provides that: Defenses and objections based on defects in the institution of the prosecution, other than insufficiency of the evidence to warrant an indictment, information or complaint, other than it fails to show jurisdiction in the court or to charge an offense, may be raised only by motion before trial.

A motion to exclude a witness clearly falls within the class of motions that must be brought before trial. That being the case, the defendant cannot be heard to say that the trial has started when the motion is argued.

This position is confirmed by NRS 174.125 which provides in part:

1. All motions in a criminal prosecution to suppress evidence --- must be made before trial.

A motion to preclude a witness from testifying is, by its very nature, a motion to suppress evidence. It must be heard before trial. Before trial means just that; it is not part of the trial.

The instant case differs in a number of instances from the facts in Gall cited in support of the proposition.

1. The state never indicated that it was prepared to go forward. The prosecutor, when asked by the court if the parties were prepared to go forward, indicated immediately that he was not and wished to make a motion to continue. Aside from the objection by defense counsel, there was no argument. The motion was denied and the prosecution immediately invoked NRS 174.085 (5) and dismissed the complaint. Unlike the facts in Gall, the motion was granted without prejudice.

2. The issues in Gall involved the failure to list a witness and to provide discovery. No such problems occurred in this case.

3. There was extensive argument in Gall over the issues of discovery and the failure of the state to list a witness. No such argument took place in this case. There was no testimony taken.

Judge Breen's order makes it clear that a trial begins with the commencement of the taking of testimony. State v. Blackwell, 65 Nev. 405 (1948). Attorneys for the defense and the state do not testify. They argue.

If it were otherwise jeopardy would attach immediately upon the hearing of pretrial motions weeks before the trial might begin. To follow the defendant's reasoning jeopardy certainly would attach on the day of the trial if motions in limine were heard before the jury was empanelled. Counsel certainly would argue the merits of their motions. They would not be offering testimony or testifying in any sense of the word.

As to the balance of Judge Breen's order, the state respectfully disagrees. The legislature has given the prosecution precisely the authority which Judge Breen says it may not have; the authority to dismiss once without prejudice and to proceed by refiling the complaint and ordering the defendant into court by way of summons.

The defendant offers no Supreme Court authority either federal or state in support of the proposition that a trial has begun if and when a motion is considered by the court. The only authority offered is to the contrary. This court is not bound by a decision of the Second Judicial District Court.

CONCLUSION

A trial begins when jeopardy attaches. There is no other definition for "begins" anywhere to be found.

A motion to suppress is a pretrial matter. A trial does not begin until all preliminary matters have been dealt with.

The statute gives the prosecution an unfettered right to dismiss.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

DNA & Scientific Evidence Generally

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Attorney for Plaintiff
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

ISSUE PRESENTED: IS STATISTICAL EVIDENCE OF DNA TESTING ADMISSIBLE WITHOUT THE TESTIMONY OF A POPULATION GENETICIST?

The Nevada Supreme Court assesses the admissibility of scientific evidence in terms of trustworthiness and reliability. Santillanes v. State, 104 Nev. 699, 704, 765 P.2d 1147, 1150 (1998). The overwhelming weight of authority has established that DNA analysis utilizing the PCR technique Is reliable and trustworthy for use within the forensic context, see United States v. Hicks, 103 F.3d 837, 844-47, (9th Cir. 1996), cert. denied, ____ U.S. ____, 117 S.Ct. 1487 (1997); United States v. Beasley, 102 F.3d 1440, 1444-48 (8th Cir. 1996), cert. denied, ____ U.S. ____, 117 S.Ct. 1856 (1997); State v. Lyons, 924 P.2d 802, 804-14 (Or. 1996); People v. Pope, 672 N.E.2d 1321, 1325-28 (Ill. App. Ct. 1996); State v. Gentry, 888 P.2d 1105, 1117-18 (Wash. 1995).[24] Further, the Nevada Supreme Court has held that DNA results obtained through the use of the PCR technique are admissible for use within the forensic context. See, Bollin v. State, 114 Nev. 503, 960 P.2d 784 (1998).

Other jurisdictions that have addressed the issue of whether or not a DNA laboratory expert was properly qualified to testify regarding population genetics have held in favor of the State's position. See, United States v. Davis, 40 F.3d 1069, 1075 (1994). In Davis, the Court held, "statistical probabilities are basic to DNA analysis and there use has been widely researched and discussed." After the Court reviewed the qualifications of the government's DNA expert, the Court concluded that the witness could testify "about genetics with the context of DNA

[24]Jeff Riolo will use the PCR technique to forensically analyze the DNA in question.

evidence." Id., at 1075; see also, State v. Isley, 936 P.2d 275, 280 (Kan. 1997). Here, Jeff Riolo, a Criminalist at the Washoe County Crime Lab, who has testified as an expert in the field of DNA analysis, will provide a statistical analysis of his results. The genetic population statistics adopted by the Washoe County Sheriff's Office Forensic Division DNA section are derived from the National Research Council (NRC). These statistical figures are set forth in a publication generally accepted within the scientific community as approved statistical basis in DNA testing. That publication is entitled, National Research Council, Commission on DNA Forensic Science; The Evaluation of Forensic DNA Evidence (1996).

In United States v. Ortiz, 125 F.3d 863 (10th Cir. 1997), a Ms. Ranadive, an employee of Cellmark Diagnostic, did not testify as to the identity of the individual whose DNA was found in their case. She testified as to the probability of finding someone with that specific DNA profile in each of the three ethnic groups for which Cellmark Diagnostic keeps its database. The Court concluded that Ms. Ranadive relied on and based her opinion on the type of data reasonably relied upon by experts in her field. Further, the Ortiz Court cited United States v. Davis, supra, for the proposition that statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed.

Recent cases in almost all federal and state jurisdictions have embraced the statistical probabilities produced in DNA testing. Another example of how the issue has been addressed in the State judicial system is State v. Buckner, 941 P.2d 667 (1997). In Buckner, the Washington Supreme Court reversed its earlier decision involving the admissibility of DNA evidence as it relates to statistical analysis. The Court held that based upon the new NRC criteria, "we now conclude there should be no bar to an expert giving his or her opinion, that, based upon an exceedingly small probability of a defendant's DNA profile matching that of another in a random human population, the profile is unique." The vast majority of appellate court cases since 1996, have embraced the statistical aspect of DNA testing as being generally accepted within the scientific community and a necessary element of DNA testimony. State v. Copeland, 922 P.2d 1304 (Wash. 1996); State v. Hummert, 933 P.2d 1187 (Ariz. 1997) (en

banc); State v. Peters, 944 P.2d 896, 903 (N.M. App. 1997); State v. Boles, 933 P.2d 1197, 1200 (Ariz. 1997) (en banc). Finally, the State intends to present the DNA evidence after establishing a reliable foundation. The defense will have an opportunity to cross-examine the State's expert as well as call their own expert to address DNA statistical analysis. Therefore, the question is not whether the evidence should be admissible, the question is what weight a jury would give the evidence during deliberations. See, United States v. Gwaltney, 790 F.2d 1378 (9th Cir. 1996), cert. denied, 479 U.S. 1104 (1987).

The Ninth Circuit has opined that, "Daubert cautioned lower courts not to confuse the role of judge and jury by forgetting that 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof' rather than exclusion 'are traditional and appropriate means of attacking shaky but admissible evidence'" United States v. Chischilly, 30 F.2d 1144, 1154 (9th Cir. 1994). The statistical probabilities that will be testified to by Jeff Riolo, assuming the DNA matches the defendant's, should be admitted pursuant to NRS 50.285.

CONCLUSION

DNA statistical evidence has reached the level of acceptance within the scientific community. DNA statistical evidence has been admitted in a number of courts and a population geneticist is not necessary to establish the statistics as they have also been generally accepted in the scientific community along with the acceptance of DNA evidence. In fact, defendant's have appealed the failure to admit statistical evidence in a DNA context. These appeals were unsuccessful. See, Brodine v. State, 936 P.2d 545, 551-52 (Alaska Ct. App. 1997); Sholler v. Commonwealth, 45 K.L.S. 720 (Kent. 96-SC-856-MR, 6/1998).

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____

Deputy District Attorney

Domestic Battery Priors

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Attorney for Plaintiff
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE TO MOTION TO STRIKE PRIOR CONVICTIONS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and submits the State's Response to Motion to Strike Prior Convictions.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

THE DEFENDANT'S PRIOR CONVICTIONS SHOULD RIGHTFULLY BE USED TO ELEVATE DEFENDANT'S CRIME TO A FELONY

The plain and unambiguous language in Section 18 of the bill explains which offenses are subject to the changes in the law now enacted as NRS 200.485. The bill specifies that any domestic battery thus enhanced must occur after January 1, 1998. The bill declares new penalties for recidivists who continue to batter, and gives offenders notice of the enhanced penalties they will face. The word offense {"for the first offense within the immediately preceding seven years." [AB 170, Section 18, subdivision 1(a)] "for the second offense within the immediately preceding seven years." [AB 170, Section 18, subdivision 2(b)] "for a third offense within the immediately preceding seven years. [AB 170, Section 18, subdivision 2(c)]}" means the actual crime itself. The degree of punishment attached to the commission of the crime is dependent on the number of defendant's prior convictions for domestic battery occurring within the seven years previous to the new offense. Clearly, the law intended to increase punishment for recidivists committing new domestic batteries. The washout period for priors used to enhance punishment for new offenses, is specified as seven years. The actual punishment is predicated on how many prior batteries occurred within the immediately preceding seven years.

The clear, unambiguous wording of the law itself, which has been in effect since January 1, 1998 is inconsistent with the defense argument that the word "offenses" refers to prior convictions as well as batteries punished under the new law. The legislature clearly meant to enhance punishment for recidivists.

II

THE LAW IS INTENDED TO PUNISH RECIDIVISTS
MORE HARSHLY THAN BEFORE

Further evidence of the legislative intent's to punish repeat offenders whose prior convictions occur prior to January 1, 1998 can be found in Section 1 of AB 170:

> 1. There is a critical public need to insure the effective prosecution of persons who commit acts of domestic violence in this state.
>
> 2. The laws of this state require amendment to improve the prosecution of crimes involving domestic violence.
>
> 3. The high recidivism rate for the crimes of battery, sexual assault, and stalking when committed against the spouse, child or relative of the offender or other person who the offender or other person is or was dating indicates that alternative sentencing procedures for such crimes are necessary.

Given the legislature's concerns about domestic violence, the more reasonable interpretation of Section 32 of AB 170 is that the enhancement process does not take effect until January 1, 1998, but after that time, any applicable prior conviction, regardless of when it occurred, may be used to enhance a third conviction for domestic battery to a felony. Obviously, if the contrary was true, abusive spouse are free of felony status and punishment until they commit three additional acts of domestic violence offenses after January 1, 1998. Compare Polson v. State, 108 Nev. 1044, 1047, 843 P.2d 825 (1992) - "an ambiguous statute can be construed in line with what reason and public policy would indicate the legislature intended." Also, see People v. Jackson, 37 Cal.3d 826, 833, 694 P.2d 736 (Cal. 1985)-"the basic purpose of this section...the deterrents of recidivism ...would be frustrated by a construction which did not take account of prior criminal conduct."

III

THE LAW DOES NOT ESTABLISH A NEW OFFENSE

Further evidence of the legislature's intent is that NRS 200.485 does not establish a new offense; it merely increases the penalty for additional convictions. Thus, as of January 1, 1998, our legislature put defendants on notice of the precise penalty they risk when they choose to

commit a new act of domestic battery. Accord State v. Hall, 895 P.2d 229, 232 (N.M.App. 1995)- since the defendant's actions occurred six months after the new DUI statute was enacted, he had "fair warning" that if he committed a new DUI, his previous convictions could be used to enhance his sentence.

Counsel argues that the language in Section 32 ("Sections 18 and 19 of this act do not apply to offenses that are committed before January 1, 1998") is intended to bar use of prior convictions. Instead, the language protects against any retroactive felony enhancement of misdemeanor batteries committed prior to January 1, 1998 by operation of law. To fail to clarify such a point would render ex post facto punishment to offenders who acted prior to January 1, 1998.

If the law was intended to fall within the tortured construction suggested by the defense argument, then why is Section 19 included? Nowhere in Section 19 are prior offenses mentioned. Section 19 is used to discuss types of battery. Interestingly, it does not create a new offense for this crime either, so the suggestion that AB 170 changes the actual offense to a new offense is also untrue.

Section 18 does apply the new penalty provisions, and creates a felony enhanced conviction, but the language in Section 32 is intended to prevent offenses committed prior to January 1, 1998 from retroactive enhancement.

Any law which was passed after the commission of the offense for which the party is being tried is an ex post facto law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed. In re Medley, 134 U.S. 160, 171, 10 S.Ct. 384, 33 L.Ed. 835 (1890).

The enactment of a statute or its amendment which imposes a harsher penalty after prior convictions is not an ex post facto law. Alaway v. United States, 280 F.Supp. 326 (C.D.Cal.1968).

IV
FAILURE TO MODEL THE DOMESTIC BATTERY STATUTE ON NRS 484.3792 DOES NOT RENDER

THE PRIOR CONVICTIONS UNUSABLE.

The language quoted concerning prior convictions from the 1983 bill regarding DUI priors is surplusage. The language regarding prior offenses in the Domestic Battery law is clear and unambiguous. Such language is not required. The law clearly penalizes new offenses.

V

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Double Jeopardy Administrative Sanction

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

APPELLANT'S OPENING BRIEF

COMES NOW, RICHARD A. GAMMICK, District Attorney, by and through , Deputy District Attorney of Washoe County, Nevada, and hereby files this appeal of the Justice Court's dismissal of this case on the basis of double jeopardy. The Justice Court abused its discretion when it determined that the administrative action taken by the employer prevented the State from proceeding on its criminal case. This Appeal is based upon the grounds set forth in the attached Points and

Authorities, all records and pleadings on file and any oral argument the Court should allow.

DATED this _____ day of _____, 2000.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

ISSUE

When a teacher hits a student, is the administrative action by the School Board of giving defendant unpaid leave so punitive in nature as to prevent a criminal prosecution for battery?

PROCEDURAL HISTORY

The Court granted the Motion to Dismiss stating that the

> "District appeals to have originally proceeded against the defendant under NRS 391.314(1). It subsequently disciplined him in a punitive manner under NRS 391.314(8). According to the documentation prepared by the District, the clear inference to be drawn is that the misconduct punished includes the conduct charged in this Criminal Complaint."

STATEMENT OF FACTS

DOUBLE JEOPARDY DOES NOT APPLY

The State contends that Double jeopardy does not apply for two reasons: (1) An administrative action is remedial, it is not criminal in nature and is not a trial for purposes of double jeopardy; (2) in addition, the administrator for the school district suspended for inappropriate actions which included racist comments and the battery.

THIS IS NOT A SECOND PROSECUTION OR TRIAL THUS

DOUBLE JEOPARDY DOES NOT APPLY

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This protection applies to the states through the Fourteenth Amendment and has been incorporated into the Nevada Constitution. See Nev. Const. art. 1, § 8, cl. 1. The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).

It has long been recognized, however, that double jeopardy "does not prohibit the imposition of any additional sanction that could, " 'in common parlance,' " be described as punishment." See Hudson, 522 U .S. at ----, 118 S.Ct. at 493 The Clause protects only against the imposition of multiple criminal punishments for the same offense." Id. at ----, 118 S.Ct. at 493. See State v. Lomas, 114 Nev. 313, 955 P.2d 678 (1998).

Double jeopardy does not prevent an employer from taking remedial action against its employee. Otherwise, a teacher could shoot and kill a principal and the school district could not suspend nor fire a teacher pending the outcome of the murder trial.

CIVIL PENALTIES ARE NOT PROSECUTIONS FOR DOUBLE JEOPARDY PURPOSES

The Nevada Supreme Court has already held that civil penalties are not prosecutions for double jeopardy purposes. In Yohey v. State, Dep't Motor Vehicles, 103 Nev. 584, 747 P.2d 238 (1987), the court held that the objective of administrative revocation of a driver's license is not to impose additional punishment, but to protect the unsuspecting public from irresponsible drivers. The Court cited State v. Parker, 335 P.2d 318 (Id. 1959), holding that

> the revocation of a driver's license or driving privilege is not a part of the penalty provided for violation of the statute. The deprivation of the driving right or privilege is for the protection of the public, and is not done for the punishment of the individual convicted.

Similarly in State v. Nichols, 819 P.2d 955 (Ariz. App. 1992) stated that even though a statute designed primarily to serve remedial purposes incidentally serves the purposes of punishment as well does not mean that the statute results in punishment for the purposes of double jeopardy. See also State v. Murray, 644 So.2d 53 (Fla. App. 4 Dist. 1994).

Further, a suspension from an employment position is not part of the criminal penalty provided for under the battery statute. Every person convicted of a misdemeanor can be punished by imprisonment in the county jail for not more than 6 months and a fine of not more than $1,000 or both or a period of community service. See NRS 193.150.

THE NEW DOUBLE JEOPARDY ANALYSIS UNDER NEVADA LAW

In Levingston v. Washoe County (1998) 114 Nev. 306, the Nevada Supreme Court reversed its prior opinion in Levingston 112 Nev. 479 (cited by counsel) and conducted an analysis of Double Jeopardy utilizing the United States Supreme Court's decision in United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

The Levingston Court held:

> [T]he Supreme Court reexamined whether a civil in rem forfeiture constitutes punishment for double jeopardy purposes and reversed the rulings of the Sixth and Ninth Circuit Courts of Appeal. Id. at 274-291, 116 S.Ct. at 2140-49. The Court applied a two-step test derived from its previous holdings addressing civil in rem forfeitures. Id. at 288, 116 S.Ct. at 2147 (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972); Various Items of Personal Property v. United States, 282 U.S. 577, 51 S.Ct. 282, 75 L.Ed. 558 (1931)).
>
> First, the two-step analysis approved in Ursery requires an examination of legislative intent to ascertain whether the forfeiture statutes were intended to be civil or criminal. Id. at 288, 116 S.Ct. at 2147. If this examination discloses a legislative intent to create civil in rem forfeiture proceedings, a presumption is established that the forfeiture is not subject to double jeopardy. Id. at 290 n. 3, 116 S.Ct. at 2148 n. 3.
>
> Second, Ursery requires an analysis of "whether the proceedings are so punitive in fact as to '[demonstrate] that the forfeiture proceeding[s] may not legitimately be viewed as civil in nature,' " despite legislative intent to the contrary. Id. at 288, 116 S.Ct. at 2147 (quoting 89 Firearms, 465 U.S. at 366, 104 S.Ct. at 1107). The "clearest proof" is required to establish that the forfeiture proceedings are so punitive in form and effect as to render them criminal despite legislative intent to the contrary. Id. at 290 & n. 3, 116 S.Ct. at 2148 & n. 3.
>
> Applying this two-step analysis, the Court determined in Ursery: (1) that the forfeiture statutes at issue were intended to establish civil in rem proceedings; and (2) that there was "little evidence, much less the 'clearest proof' " that the forfeitures were so punitive in form and effect as to render them criminal despite the contrary statutory intent. Id. at 288-291, 116 S.Ct. at 2147-49. Therefore, the Court ruled, the forfeitures and convictions at issue did not offend the Double Jeopardy Clause of the United States Constitution. Id. at 291, 116 S.Ct. at 2149.

The first step under Usery and its prodigy is to ascertain whether the legislature intended the Statute to be civil or criminal. If this examination discloses a legislative intent to

create a civil proceeding, a presumption is established that the person is not subject to double jeopardy.

In 1967, Senate Bill 115 was enacted and became NRS 391.314. The Legislative History indicates that NRS 391.314 was adopted to "provide safeguards for the teachers and provide equitable procedures for supervisory controls. In the main the bill provides that educators who sign contracts are liable to suspension or revocation if they fail to fulfill their contracts. The reasons for dismissal are specifically outline, this being essential for enforcement." Mr. Butler, Secretary of the Nevada State Educators stated, "the bill will encourage a more careful and extensive evaluation of educators by the school administrators. It will also cause the districts to take a loot at their personnel policies." (Exhibit G)

The Legislative intent is that the suspension or termination is an administrative function in regards to personnel. The Legislature placed this specific statute in question under the Education and Personnel statutes and not in the criminal statutes. Although, NRS 391.314 in part deals with employees who have been charged or convicted of a criminal act, it requires a review by a superintendent and not a judge, and thus can only be an administrative function.

Moreover, as the Court noted in Hudson, 522 U.S 93, 188 S.Ct. at 496, the legislature's decision to confer authority to impose a civil sanction on an administrative agency is prima facie evidence that the legislature intended to provide for a civil sanction. Hudson, 522 U.S. at 95, 118 S.Ct. at 495. Therefore, it is clear that the Nevada legislature intended administrative proceedings relating to personnel problems to be civil and not criminal.

THE SCHOOL DISTRICT'S REMEDY IS NOT CLEARLY PUNITIVE

The Second step under Usery is that there must be the "clearest proof" that the suspension statute is so punitive in form and effect as to render them criminal despite legislative intent to the contrary. The hardest punishment that a Superintendent can provide under NRS 391.314 is to terminate the employment and as such it can hardly be said that a loss of a job is so punitive as to render it criminal. Under the battery statute the defendant if convicted has a

possible sentence of up to 6 months in the Washoe County Jail and a fine of up to $1000.00. A possible loss of income is not so punitive as to match a loss of freedom.

In U.S. v. Hudson 522 U.S. 93, 118 St. Ct. 488 (1997) the United States Supreme Court dealt with the issue of whether a penalty by an employer would prevent a criminal prosecution. In Hudson bank officers were accused of misapplication of bank funds which resulted in monetary fines and debarment by the Office of the Comptroller of Currency.

In determining that double jeopardy did not apply, the Hudson Court looked to seven factors listed in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-68, 9 L.Ed.2d 644 (1963), as "useful guideposts." Hudson, 522 U.S. at 93, 118 S.Ct. at 493. These factors include: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. Id. at 96, 118 S.Ct. at 493. The Hudson Court emphasized that these factors must be considered "in relation to the statute on its face," and "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Id., 118 S.Ct. at 493 The Court held:

> Applying traditional principles to the facts, it is clear that petitioners' criminal prosecution would not violate double jeopardy. The money penalties statutes' express designation of their sanctions as "civil," see §§ 93(b)(1) and 504(a), and the fact that the authority to issue debarment orders is conferred upon the "appropriate Federal banking agenc[ies]," see §§ 1818(e)(1)-(3), establish that Congress intended these sanctions to be civil in nature. Moreover, there is little evidence -- much less the "clearest proof" this Court requires, see Ward, 448 U.S., at 249, 100 S.Ct., at 2641-2642--to suggest that the sanctions were so punitive in form and effect as to render them criminal despite Congress' contrary intent, see United States v. Ursery, 518 U.S. 267, ----, 116 S.Ct. 2135, 2148, 135 L.Ed.2d 549. Neither sanction has historically been viewed as punishment, Helvering, supra, at 399, and n. 2, 400, 58 S.Ct., at 633 and n. 2, 633, and neither involves an affirmative disability or restraint, see Flemming v. Nestor, 363

> U.S. 603, 617, 80 S.Ct. 1367, 1376, 4 L.Ed.2d 1435. Neither comes into play "only" on a finding of scienter, Kennedy, 372 U.S., at 168, 83 S.Ct., at 567, since penalties may be assessed under §§ 93(b) and 504, and debarment imposed under § 1818(e)(1)(C)(ii), without regard to the violator's willfulness. That the conduct for which OCC sanctions are imposed may also be criminal, see ibid., is insufficient to render the sanctions criminally punitive, Ursery, supra, at ----, 116 S.Ct., at 2148-2149, particularly in the double jeopardy context, see United States v. Dixon, 509 U.S. 688, 704, 113 S.Ct. 2849, 2860, 125 L.Ed.2d 556. Finally, although the imposition of both sanctions will deter others from emulating petitioners' conduct, see Kennedy, supra, at 168, 83 S.Ct., at 567, the mere presence of this traditional goal of criminal punishment is insufficient to render a sanction criminal, as deterrence "may serve civil as well as criminal goals," e.g., Ursery, supra, at ----, 116 S.Ct., at 2149. Pp. 495-496.

Applying the Hudson reasoning to our case, NRS 391.314 is in the Personnel chapter of the NRS not the criminal statutes. The authority to suspend is conferred upon the superintendent which establishes that the Legislature intended these sanctions to be civil in nature. And there is no evidence, much less the "clearest Proof" that the Legislature intended that the sanctions be so punitive in form and effect as to render them criminal despite its wording. The severest action a superintended can provide is to terminate an employee, which historically has not been viewed as punishment. A termination does not involve an affirmative disability nor a restraint, so it does not enter the criminal arena of punishment.

CONCLUSION

Double jeopardy does not apply as reasoned in Hudson and Usery. The Legislative intent was to provide safeguards for teachers and equitable procedures for supervisory controls. In addition, the suspension is not so punitive in form as to render it criminal. The defendant has not shown the "clearest proof" that NRS 391.314 was intended to replace the criminal statute. The State respectfully requests the Court grant this appeal and direct the Justice Court to hear the case on its merits.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Double Jeopardy DUI D.L. Suspension

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The defendant contends that the revocation of his Nevada driving privileges by the Department of Motor Vehicles and Public Safety based on an arrest for driving under the influence of a controlled substance in violation of NRS 484.397 constitutes criminal punishment. Further, the defendant contends that this action bars any subsequent criminal prosecution for the driving under the influence of a controlled substance. The defendant relies on the Supreme Court of Nevada decisions of Wright v. State, 112 Nev. 391, 916 P.2d 146 (1996); Levingston v. Washoe County, 112 Nev. 479, 916 P.2d 163 (1996); Desimone v. State, 111 Nev. 1221, 904 P.2d 1 (1995).

Desimone, supra., involved the State's filing a claim against the defendant for taxes and civil penalties pursuant to NRS 372A, entitled, "Tax on Controlled Substances" after the defendant had been convicted of trafficking in a controlled substance. The Court relied heavily on the United States Supreme Court's decision in United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), and Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 and 128 L.Ed.2d 767 (1994), in arriving at its holding that imposition of this drug tax triggered the protections of the Double Jeopardy Clause. Further, the Court found that since this tax had been reduced to a judgment before the criminal proceedings on the same acts, the Double Jeopardy Clause barred the subsequent criminal prosecution. The State urges this Honorable Court not to rely on this case. The United States Supreme Court has subsequently stated that the Halper decision was "ill considered." The Court went on to note that all civil penalties have some deterrent effect. See Hudson v. United States, 118 S.Ct. 488, 494 (1997). Wright and Levingston, supra., involve defendants who were convicted of drug offenses and then were subject to civil forfeiture proceedings arising out of the same drug offenses. The Supreme Court of Nevada held that the civil forfeiture proceedings constituted punishment which triggered the protections of the Double Jeopardy Clause barring a subsequent criminal proceeding arising out of the same actions. The defendant's reliance on those cases is ill

placed. The Supreme Court of Nevada has held that the administrative revocation of one's drivers license by the Department of Motor Vehicles and Public Safety pursuant to NRS 483.460 is not to impose additional punishment. Rather, the "objective of administrative revocation of a driver's license under NRS 483.460 is not to impose additional punishment, but to protect the unsuspecting public from irresponsible drivers," Yohey v. State, Department of Motor Vehicles and Public Safety, 103 Nev. 584, 587, 747 P.2d 238, 240 (1987). The Court quoted extensively and with clear approval a decision of the Idaho Supreme Court, State v. Parker, 81 Idaho 51, 336 P.2d 318, 320 (1959):

> The revocation of driver's license or driving privilege is not part of the penalty provided for violation of the statute. The deprivation of the driving right or privilege is for the protection of the public, and is not done for punishment of the individual convicted. Moreover, the revocation is not by the court in which the conviction occurs, but is by the commissioner of law enforcement, in pursuance of regulations and conditions imposed upon the exercise of the driving right or privilege, under the police power of the state. Yohey, supra., at 588.

Additionally, the Supreme Court of Nevada has ruled that the Department of Motor Vehicles' license revocation hearing is a civil proceeding and not a criminal prosecution. In State Department of Motor Vehicles v. McLeod, 106 Nev. 852, 801 P.2d 1390 (1990), the Court held that the defendant's statements made to the law enforcement officer who had not given the defendant her Miranda warnings were admissible at the DMV hearing to revoke defendant's driving privileges pursuant to NRS 483.460. The Court found that the revocation hearing was a civil proceeding,

not a criminal trial. In so doing the Court cited Yohey, supra., with approval. McLeod, at 853.

Moreover, in State of Nevada Motor Vehicles and Public Safety v. Root, 113 Nev., Advance Opinion 104, the Supreme Court of Nevada held that "revocation of a driver's license implicates a protectable property interest entitling the license holder to due process." See Root, supra., at page 3. However, the Court went on to review the hearing officer's administrative decision. The Court applied the administrative standard of review: "...to review the evidence before the agency so that a determination can be made as to whether the agency

decision was arbitrary, capricious, or an abuse of discretion." See Root, supra., at page 4. At no time in this decision did the Court apply any criminal standard to the hearing officer's administrative decision.

Finally, the United States Supreme Court ruled on the Double Jeopardy issue in Hudson, supra. The defendants agreed to pay the Office of the Comptroller of the Currency certain assessments and to refrain from engaging in banking activities as a result of allegations of illegal banking activities by the defendants. This agreement was made after the Office of the Comptroller of the Currency had assessed penalties against defendants and given them notice of intent to prohibit further banking activities on their part. Both the penalties and the notice were done based on Federal banking statutes. After the defendants entered into this agreement to resolve matters with the Office of the Comptroller of the Currency, the defendants were indicted on multiple counts of criminal conspiracy, misapplication of bank funds, and making false bank entries in violation of Federal criminal statutes. The Court held that the Double Jeopardy Clause protects only against multiple criminal punishments and multiple criminal prosecutions. Before concluding that a proceeding is criminal in nature or the sanctions imposed are criminal punishment, the Court reviewed a series of factors bearing on this issue. Several of the significant factors bearing on this issue of Double Jeopardy are: whether the revocation of a driver's license has historically been regarded as punishment. The Supreme Court of Nevada has considered revocation of a driver's license not to be punishment. See Yohey, supra. Whether the revocation promotes the traditional aims of punishment. Again, the Supreme Court of Nevada has held that the purpose of revocation of driver's license is to protect the unsuspecting public from drunk drivers, not to punish the targeted driver. Again, see Yohey, supra. Whether an alternative purpose can be assigned to it. As stated next above, the Supreme Court of Nevada has held that driver's license revocation serves the purpose of protecting the general public and is not to punish the targeted driver. Finally, whether the revocation of the driver's license is excessive in relation to protecting the general public from drunk drivers. The administrative sanction of revocation of one's driving privileges is minor compared to the public interest in

safety of other drivers and protection of those drivers from drunk drivers. Revocation is designed to deter drunk drivers from driving on Nevada's highways for a set period of time. Therefore, the revocation is not at all excessive when compared to the overall goal of public safety.

Therefore, based upon the United States Supreme Court and Supreme Court of Nevada rulings cited above, it is clear that the DMV hearing to revoke the defendant's driving privileges in Nevada was administrative in nature. Revocation does not constitute criminal punishment as defined by those rulings. Therefore, the Double Jeopardy Clause does not bar the criminal trial scheduled for February 25, 1998.

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Double Jeopardy State vs. Federal Standard

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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THE NEW DOUBLE JEOPARDY ANALYSIS UNDER NEVADA LAW

In Levingston v. Washoe County (1998) 114 Nev. 306, the Nevada Supreme Court reversed its prior opinion in Levingston 112 Nev. 479 (cited by counsel) and conducted an analysis of Double Jeopardy utilizing the United States Supreme Court's decision in United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

> The Levingston Court held:
> [T]he Supreme Court reexamined whether a civil in rem forfeiture constitutes punishment for double jeopardy purposes and reversed the rulings of the Sixth and Ninth Circuit Courts of Appeal. Id. at 274-291, 116 S.Ct. at 2140-49. The Court applied a two-step test derived from its previous holdings addressing civil in rem forfeitures. Id. at 288, 116 S.Ct. at 2147 (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972); Various Items of Personal Property v. United States, 282 U.S. 577, 51 S.Ct. 282, 75 L.Ed. 558 (1931)).
>
> First, the two-step analysis approved in Ursery requires an examination of legislative intent to ascertain whether the forfeiture statutes were intended to be civil or criminal. Id. at 288, 116 S.Ct. at 2147. If this examination discloses a legislative intent to create civil in rem forfeiture proceedings, a presumption is established that the forfeiture is not subject to double jeopardy. Id. at 290 n. 3, 116 S.Ct. at 2148 n. 3.
>
> Second, Ursery requires an analysis of "whether the proceedings are so punitive in fact as to '[demonstrate] that the forfeiture proceeding[s] may not legitimately be viewed as civil in nature,' " despite legislative intent to the contrary. Id. at 288, 116 S.Ct. at 2147 (quoting 89 Firearms, 465 U.S. at 366, 104 S.Ct. at 1107). The "clearest proof" is required to establish that the forfeiture proceedings are so punitive in form and effect as to render them criminal despite legislative intent to the contrary. Id. at 290 & n. 3, 116 S.Ct. at 2148 & n. 3.
>
> Applying this two-step analysis, the Court determined in Ursery:
> (1) that the forfeiture statutes at issue were intended to establish civil in rem proceedings; and (2) that there was "little evidence, much less the 'clearest proof' " that the forfeitures were so punitive in form and effect as to render them criminal despite the contrary statutory intent. Id. at 288-291, 116 S.Ct. at 2147-49.

Therefore, the Court ruled, the forfeitures and convictions at issue did not offend the Double Jeopardy Clause of the United States Constitution. Id. at 291, 116 S.Ct. at 2149.

CONCLUSION

Under Usery the defendant has not shown the "clearest proof" that NRS 391.314 was intended to replace the criminal statute. The State respectfully requests the Court to deny the Motion to Dismiss.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Duce Tecum Subpoena Materiality

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

"...a criminal defendant is only entitled to subpoena documents that are shown to be material to his or her defense. Pennsylvania v. Ritchie, 480 U.S. 39,59, 107 S.Ct. 989, 1002." Jaeger v. State, 113 Nev. 1275 (1997). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Ritchie at 57.

Furthermore, the defendant must show how the requested documents are relevant to the instant case as well as material. Again, there has been no showing. Defendant is requesting all audio and video tapes during a two and a half hour time period. Many other functions of law enforcement may have been conducted during this time period as well. Such functions may include running the license plates of other vehicles thus disclosing registration information, requesting driver's license checks and the disclosure of social security numbers. Such information has absolutely no relevance to the instant case. Certainly the defense is not entitled to information which does not concern or implicate the defendant in any way. Furthermore, Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance. See Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846 (1977)" Ritchie at 1002. Additionally, the defendant requests virtually every bit of information, including all test results, regarding the Intoxilyzer 5000 between October 1, 1999 and January 20, 2000. Once again, there has been no showing of materiality nor relevancy. To expect the Washoe County Sheriff's Office to reveal the names and test results of every person who blew into the Intoxilyzer 5000 is ludicrous. The defendant certainly has no right to discover the blood alcohol level of a person unrelated to her case. The only relevant time period in this case is the date and time of the offense. Whether or not the machine was working properly at that time is the only relevant and material inquiry. Such a question can easily be

answered without providing the documentation requested. Furthermore, should the defendant have questions regarding the Intoxilyzer

5000 and its maintenance schedule, she need only subpoena the Forensic Analyst of Alcohol.

Unless the defendant is able to show the relevancy and materiality of the documents requested, beyond mere speculation, all records, copies of logs, memoranda concerning maintenance or performance problems and results of all tests administered from October 1, 1999 through January 20, 2000 are not discoverable. The defendant is embarking upon a fishing expedition in the hopes of finding something that *might* be helpful to defendant's case. Such is not allowed. See Ritchie and Jaeger.

NRS 174.335 authorizes the production of documentary evidence, however, section two also states the court may quash or modify the subpoena if compliance would be unreasonable or oppressive. The defendant's subpoena duces tecum is extremely unreasonable as it involves people other than the defendant and would require hours upon hours of reviewing and redacting video and audio tapes in order to properly comply with the subpoena and still protect the privacy interests of those persons having absolutely no involvement in the instant case.

II. CONCLUSION

The State hereby requests a hearing in order for the defendant to show how the items requested in the subpoena duces tecum are material, relevant, reasonable and not oppressive. In Jaeger, infra, the Nevada Supreme Court discusses at length the Ritchie case, infra, stating:

> The Supreme Court held that "the ability to question adverse witnesses...does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." Id. at 53, 107 S.Ct. at 999. The court also held that a "defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [State's] files." Id. at 59, 107 S.Ct. at 1002.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Due Process Violation

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Due Process

"Government conduct is only constitutionally impermissible where 'shocking to the universal sense of justice' and violative of the fundamental fairness mandated by the due process clause." Hillis v. State, 103 Nev. 531, 534, 746 P.2d 1092 (1987), quoting United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 1642. "Because the government may go a long way in concert with the investigated person without violating due process, United States v. Musslyn, 865 F.2d 945, 947 (8th Cir. 1989)(per curium), the level of outrageousness needed to prove a due process violation 'is quite high'," United States v. Jacobson, 916 F.2d 467, 469 (8th Cir. 1990), quoting Gunderson v. Schlueter, 904 F.2d 407, 410 (8th Cir. 1990).

In arguing that the State has violated her right to due process, the defendant claims that People v. Isaacson, 378 N.E.2d 78 (1978), is "factually on point." In that case, the informant was beaten by the police and was deceived into believing that he was facing several years in prison. The informant cried on the phone and told Isaacson that the police had beaten him and that he needed to make some money to post bail and hire an attorney. Id. at 80. After several phone calls, Isaacson finally agreed to supply the informant with cocaine. Id. at 80. Because Isaacson was a resident of Pennsylvania who was concerned about New York's drug laws, he insisted that the deal take place in Pennsylvania. Id. at 80. The informant, however, arranged for the transaction to take place at a location that, unbeknownst to Isaacson, was just inside of the New York border. Id. at 80-81.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

DUI Actual Physical Control Automobile

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The state opposes the appeal on two grounds:

1. The lower court was correct when it said that the facts met the definition of "actual physical control"

2. This court should not reverse the decision of the trier of fact absent egregious error.

I. ACTUAL PHYSICAL CONTROL

The Nevada Supreme Court has ruled on the issue "of actual physical control" a number of times. Four cases, all decided in 1989 are considered the controlling cases in the matter. They follow with a brief synopsis of the fact situation in each. Guilt was confirmed in three and the appeal allowed in one as noted below.

1. State v. Rogers, 105 Nev. 230 (1989)

The defendant was found parked on a public highway, partially in the travel lane, defendant apparently drove the car to the location, the vehicle's engine was running and its lights were on and the defendant, who was asleep and slumped over, was seated in the driver's position directly behind the steering wheel. The defendant's conviction was affirmed.

2. State v. Bullock, 105 Nev. 326 (1989)

The defendant's vehicle was parked in the parking lot of a bar, well off the road. The engine was running and the parking lights were on. The defendant was behind the wheel with the seat in a reclining position. The defendant was motionless with his eyes closed and his hands in his pockets. The defendant's conviction was overturned.

3. Isom v. State, 105 Nev. (1989)

The defendant was asleep in the driver's seat and the engine was running. The vehicle was parked at a closed gasoline station at 11:30 p.m. The court found as a fact that the

defendant had driven to that location and could have returned to the highway at any moment. The court affirmed the defendant's conviction.

4. State v. Torres, 105 Nev. 558 (1989)

The defendant was discovered at 3:3:30 a.m., "passed out" in the drive thru lane of a restaurant. The defendant was slumped sideways, partially in the passenger seat, the keys were in the ignition with the switch in the "on" position but the motor was not running. It was necessary to shake the defendant awake. The conviction of the defendant was affirmed.

The court reversed the decision of the lower court in Bullock on a number of grounds not the least of which was the public policy issue when they found that drivers should be encouraged to "sleep it off". More importantly, they reasoned that there was no evidence that the defendant drove to the location in an inebriated condition but rather that he had become inebriated in the bar, left when it closed and turned on the motor to keep warm while he slept and sobered up.

In the Rogers case, the court provided us with a list of issues which could be considered in determining "actual physical control". They did not say that it was exclusive or in any way limited to those facts, only that the list could be used as a guide in making the determination. The list is as follows:

1. Where and in what position was the defendant found.
2. Whether the vehicle's engine was running.
3. Whether the defendant was asleep or awake.
4. If at night, were the vehicle's lights on.
5. The location of the vehicle's keys.
6. Whether Defendant was trying to move or had moved the vehicle.
7. Whether the defendant must, of necessity, have driven to the location where he was apprehended.

The Court did not suggest that there must be some type of numerical scoring, e.g. four out of seven equals a conviction or did it exclude any other possibilities.

It is notable that the one distinguishing fact between the Bullock conviction reversal and the others where the court upheld the convictions was number seven on their list;

must the defendant of necessity have driven to the location. Having of necessity, driven to the location is a common thread through all of the conviction affirmations.

In confirming the Isom decision, the court pointed out that the defendant could have returned to the highway at any moment. The court rejected Isom's contention that she could not have been in actual physical control because she was asleep at the time. The court went on to define actual physical control as "when the person has existing or present bodily restraint, directing influence, dominion, or regulation of the vehicle". While it is somewhat difficult to discern the court's meaning of the words, "present bodily restraint", "influence, domination and regulation" are words that are clear and unequivocal. They mean simply, does one have control of the motor vehicle to the exclusion of others and can you operate it if you wish or intend to do so.

In Rogers, the court made it clear that "in actual physical control" encompasses activity broader than or different from driving a motor vehicle. The court went on to say that the objective in requiring the arrest of those who are not driving but who are in actual physical control of a vehicle, is to prevent and discourage persons from placing themselves in control of a vehicle **where they may commence or recommence driving while in an intoxicated state, notwithstanding the fact that they are not actually driving at the time they are apprehended.** (Emphasis added).

The court hypothesized that if an intoxicated person started the car, drove onto a public highway, and pulled into an emergency lane to change a flat tire, that person would clearly be in actual physical control, notwithstanding the fact that he or she had stopped the vehicle before the police arrived.

The only fact which distinguishes the hypothetical adopted by the Court in the Isom case from the situation in the instant case is that the defendant was out of his vehicle to fix a hood latch as opposed to repairing a flat tire.

An examination and comparison of the list offered in the Rogers case with that of the instant case reveals that:

1. The defendant's vehicle was running and therefor operational.

2. The keys were in the ignition.

3. The defendant had moved the vehicle. (he admitted that he had driven to the location), and,

4. The defendant must, of necessity, driven to the location.

DUI Actual Physical Control Operability

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IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, State of Nevada, by and through RICHARD A. GAMMICK, and , Deputy District Attorney, and opposes the defendant's Petition for Writ of Habeas Corpus. This Opposition is based upon the attached Points and Authorities, all papers and pleadings on file herein and any oral argument which this Court deems appropriate.

DATED this ____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF FACTS

ARGUMENT

I. THE DEFENDANT WAS IN ACTUAL PHYSICAL CONTROL OF HIS TRUCK.

Nevada Revised Statute 484.379 prohibits being in actual physical control of a vehicle while under the influence of alcohol. Many state courts have attempted to define the parameters of actual physical control. In Nevada, the Supreme Court addressed the issue in a seminal way in 1989, deciding three cases which set forth the standard for determining actual physical control. Those cases are Rogers v. State, 105 Nev. 230 (1989), Bullock v. State, 105 Nev. 326 (1989), and Isom v. State, 105 Nev. 391 (1989).

There are eight elements which must be weighed in determining whether actual physical control of a motor vehicle has occurred. Those eight elements are: 1) where and in what position the person is found in the vehicle; 2) whether the vehicle's engine is running or not; 3) whether the occupant is asleep or awake; 4) whether, if the person is apprehended at night, the vehicle's lights are on; 5) the location of the vehicle's keys; 6) whether the person was trying to move the vehicle or had moved the vehicle; 7) whether the property on which the vehicle is located is public or private; and 8) whether the person must, of necessity, have driven to the location where apprehended. Rogers, at 233-34.

The issue of whether a person can be in actual physical control of a vehicle which is inoperable has not been addressed by the Nevada Supreme Court. This Court must look to other jurisdictions to find case law on the issue. The is an abundance of case law which does address this very point.

There are two cases from Alaska, Lathan v. State, 707 P.2d 941 (Alaska App. 1985) and Mezak v. State, 877 P.2d 1307 (Alaska App. 1994), which are similar to the case at bar. The facts in Lathan were set out by the Court as follows:

> On the night of September 29-10, Mr. Lathan had driven his 1980 Chevrolet [Monza] from the L.K. Corral, where he had consumed some beer, to the College Inn liquor store. At that time, Mr. Lathan had not consumed enough alcoholic beverages to be "under the influence." When he arrived at the college Inn just before

> midnight, Mr. Lathan bought a twelve-pack of beer and drove down Farmers Loop... to the lower parking lot of the University of Alaska campus looking for a friend's car. The road surface was paved in the center but unpaved on the edges. Mr. Lathan got the left front wheel of his car stuck in a mudhole along the edge of the road.
>
> Mr. Lathan then spent between one-half and one and one-half hours attempting to extricate his vehicle from the mud. He was unsuccessful, but in the process he became cold, wet and muddy as it was raining out. Mr. Lathan then got back into his vehicle sitting behind the wheel in the normal driver's position, started the car and apparently turned on the heater. He then began drinking the beer from the twelve-pack he had purchased earlier, and over an unknown period of time, (but prior to 4:55 a.m.) consumed seven or eight twelve ounce cans of beer.
>
> Trooper Lovejoy responded to a call at about 4:55 a.m. from the University of Alaska security department, and found Mr. Lathan asleep, sitting behind the wheel with the engine running. Mr. Lathan had not intended to get his vehicle out, since he began drinking after getting stuck and did not intend to drive his vehicle [even] if he could have gotten it out of the mud. At the time Mr. Lathan was contacted, he was "under the influence of intoxicating liquor," and it was later determined that he had a blood alcohol concentration of .209 percent as of 6:06 a.m.
>
> Prior to Mr. Lathan's removal from the scene a wrecker was called.... Initial attempts to get the vehicle out by lifting the rear end with a "one ton" wrecker were unsuccessful. Eventually the vehicle was pulled out of the mud by use of a winch. The entire procedure took approximately thirty minutes. Once Mr. Lathan's vehicle was winched out, it was capable of being driven under its own power. Until it was removed from the mud, the vehicle was incapable of movement.

Id., at 942.

The Alaska Court of Appeals held that under the facts stated above the defendant was in actual physical control of the motor vehicle, despite the fact the car was not operable. The court stated that Alaska's DUI statute, similar to that found in Nevada, does not require that "moveability" of the vehicle be read into the statute. Id., at 943. In so holding, the Alaska court relied on a Montana case, State v. Taylor, 661 P.2d 33, 34-35 (1983), which held that "actual physical control" had been established despite the fact that the defendant's car was incapable of movement.

Another Alaska case addressing the issue of actual physical control of an inoperable vehicle is Mezak v. State, 877 P.2d 1307 (AlaskaApp. 1994). In that case, the Alaska Court of Appeals relied on Lathan, *supra*, and held that a boater could be charged with actual physical control of a boat even though the engine was totally inoperable. The facts in Mezak are as follows:

> On June 4, 1993, Bethel Police Sgt. John Bilyeu and Lt. Jean Achee went to the Brown Slough area in response to a report that three drunk males were leaving the area in a yellow boat. When the officers arrived, they observed the boat and saw that one of the three men, Joseph Andrews, was motoring the boat out of the slough. While the officers were obtaining a boat for their own use, the engine of the yellow boat stopped running; the officers then observed Mezak, one of the other two men in the yellow boat, exchange positions with Andrews, take controls of the boat, and repeatedly attempt to restart the engine. The officers admonished Mezak to stop and sit down. Mezak pulled the outboard motor out of the water and sat in the boat. At that point, the officers pulled along side the yellow boat, confirmed that the three men in it where intoxicated, and towed the boat ashore. The police arrested Andrews and Mezak for operating a watercraft wile intoxicated.

Id., at 1307-08. The Alaska court relied on the DUI statute, as well as a number of Alaska cases and held that even though the motor of the boat was not working while Mezak was at the controls he was in actual physical control of the boat.

Alaska is not the only state which holds that operability or "moveability" is not a requirement for a conviction for being in actual physical control of a motor vehicle. The New Mexico Appeals Court addressed this issue in State v. Harrison, 846 P.2d 1082 (N.M.App. 1992). The facts of Harrison are as follows:

> Defendant and a friend, Jude Mari (Mari), were at a mutual friend's home. Upon preparing to leave the residence, Mari noticed the Defendant was intoxicated and offered to drive for him. They got into the defendant's car. Mari drove and the Defendant was a passenger. Mari drove the vehicle for a short distance when the car stalled and would not restart. Mari testified that he steered the vehicle as close as he could to the curb and parked it. Mari further testified that he then took the keys out of the ignition, placed them under the seat, and placed bricks under the front and back tires of the vehicle. Mari instructed the Defendant not to leave the vehicle and then left in search of help.
>
> Officer Longobardi was dispatched to the area in response to a call that an individual was slumped over the steering wheel of a

> vehicle. Longobardi testified that upon arriving at the scene, he saw Defendant's vehicle in the southbound lane of traffic, positioned at least ten feet away from the curb. Longobardi confirmed that bricks were underneath the tires of the vehicle on the driver's side.
>
> Longobardi testified that, upon approaching the vehicle, he saw Defendant passed out behind the steering wheel of the car. He further testified that the key was in the ignition, the ignition was turned on, the transmission was in drive, and Defendant had his foot on the brake. The officer aroused Defendant, who spoke to Longobardi in a slurred manner. Longobardi smelled alcohol on Defendant's breath and noticed that Defendant had red, bloodshot eyes. On cross-examination, the officer admitted that he did not inquire of Defendant whether he had driven the vehicle to that location, or why the car was sitting there.

Id., at 1085 (citing Hughs v. State, 535 P.2d 1023, 1024 (Okla.Crim.App. 1975)). The overriding concern for the New Mexico Court of Appeals was not that the defendant had not driven the car, nor that the car was inoperable due to the bricks placed behind the wheels, but that the defendant **could** have driven the car at some point. This possibility to drive and injure others is the force behind most cases supporting the actual physical control rulings. Again, moveability is **not** an issue when analyzing actual physical control in this New Mexico decision.

A final case on the issue whether moveability is required for a conviction for actual physical control is State v. Larriva, 178 Ariz. 64, 870 P.2d 1160 (1993). In Larriva, a witness testified that early in the morning of March 11, 1992, he was informed by members of a racquet club that they smelled burning rubber in the parking lot. Upon investigation, the witness saw a car which was "high centered" on a curb at the edge of the parking lot, resting on a safety wire which prevented it from falling into the Rillito River. One of the rear tires was up in the air on the river side of the curb, and the other tire was touching the ground on the parking lot side of the curb. Appellant was sitting in the driver's seat, gunning the engine, which caused the tire to spin on the ground and produced the burning smell. Id., at 1160. The car was eventually removes from this position. The tow truck driver had to wedge the car over the curb. It was the driver's opinion that no one could have moved the vehicle simply by driving it and that, given the

car's proximity to the river, it was impossible for anyone to have simply pushed the vehicle over the curb from behind. Id.

The Arizona Supreme Court in Larriva engages in a discussion of the necessity of operability of a vehicle for a conviction in a case of actual physical control of a motor vehicle. In doing so they state as follows:

> A similar factual situation was presented, ..., in Garcia v. Schwendiman, 645 P.2d 651 (Utah 1982). The defendant in that case was convicted of being in actual physical control; of a vehicle under the influence after he was found in his car attempting to start the engine while intoxicated. Another car had parked behind the defendant's vehicle so that it was impossible for him to back out of his parking stall. The Utah Supreme Court found this fact to be no bar to conviction, agreeing with cases from other jurisdictions concluding that the inoperability of the vehicle does not preclude a finding of actual physical control. State v. Dubany, 184 Neb.337, 167 N.W.2d 556 (1969); State v. Schular, 243 N.W.2d 367 (N.D.1976).
>
> ... [O]ur supreme court's reliance on Garcia v. Schwendiman, together with case law from other jurisdictions, (footnote omitted) leads us to conclude that the operability of a vehicle is only tangentially relevant to the determination of actual physical control. As the Washington Court of Appeals noted in State v. Smelter, 36 Wash.app. 439, 444, 445, 674 P.2d 690, 693 (App.1984):
>
> The focus should not be narrowly upon the mechanical condition of the car when it comes to rest, but upon the status of its occupant and the nature of authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move. Where, as here, circumstantial evidential permits a legitimate inference that the car was were it was because of the defendant's choice, it follows that the defendant was in actual physical control. To hold otherwise could conceivably allow an intoxicated driver whose vehicle was rendered inoperable in a collision to escape prosecution.

Larriva, at 1161-62. Based on the reasoning of all the other courts cited in its opinion, and the Arizona Supreme Courts own prior rulings, the Court held that inoperability alone was not a bar to prosecution. The Arizona Supreme Court remanded the case back to the lower court for trial.

Ample case law exists which supports the proposition that moveability is not a requirement of being in actual physical control of a motor vehicle. For this reason, an intoxicated individual who is in actual physical control of an automobile should not be allowed

to avoid prosecution simply because the automobile is rendered inoperable in some way. For an extensive discussion of this issue *see* James O. Pearson, Jr., Annotation, *What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for the Purpose of Driving While Intoxicated Statute or Ordinance,* 93 A.L.R.3d 7 (1979). The State will provide numerous other citations to cases which support its position if this Court so requests. The citations and discussions of the case law, *supra,* was meant only as a concise overview of the issue.

The defendant contends that he should not be held to answer for the felony charge of Being in Actual Physical Control of a Motor Vehicle because the vehicle he was attempting to start may not have been operable. He relies upon the eight criteria set forth in Rogers, *supra,* in which moveability of the vehicle is not mentioned. The petitioner seems to be arguing that had our Supreme Court wanted to include this element in the actual physical control analysis they would have done so. They have not, therefore this Court should not increase the number of criteria when a higher court has decided that such action is not necessary.

However, many of the cases which hold that actual physical control does not require an operable motor vehicle were announced well before the Rogers decision in 1989. Our Supreme Court most surely knew of this issue when it announced the test to apply in Rogers. The court did not find it necessary to include the requirement of operability when determining if actual physical control had occurred.

The defendant's argument fails to address the entire issue which this court is currently facing. The common thread in all of the cases cited, *supra*, is the public safety concern which exists in the jurisprudence on this issue. The real issue is the concern that people should be safe from all those who choose to drink alcohol and then place themselves in the position of possibly operating a motor vehicle. These reckless individuals should not be allowed to avoid prosecution simply because the police have arrived in time to prevent them from driving. Though the driver may not be driving when apprehended the public should be safe from the possibility that they may drive sometime in the near future. As our own Supreme Court states, "the objective in requiring the arrest of those who are not driving but who are in actual physical

control of a vehicle, is to prevent and discourage persons from placing themselves in control of a vehicle where they may commence or recommence driving while in an intoxicated state, notwithstanding the fact that they are not actually driving at the time apprehended." Rogers, at 233. It is in the interest in the public's safety from future harm that fuels the concern regarding these dangerous, yet momentarily, nonmoving drivers.

The overwhelming tragedy of drunk driving, and the damage and destruction which can result, is a problem that our society and our legal system struggles with on a daily basis. The automobile itself is at the core of this problem. It is a massive machine made of steel, plastic and other materials which is capable of great speed. With that speed comes the ability to do great damage upon impact. Even an automobile without an operable engine, as in this case, is capable of such destruction. The forces of gravity can propel an automobile down a street without the uses of the engine. Gravity, coupled with the weight of the car, will move the car. The speed which the car can attain is variable, and can be very fast under the right conditions. If the driver of this "non-engine" car is under the influence of alcohol he can do just as much damage to persons and property as he could with a car powered by a mechanical engine. If a car can reach a speed of 30 miles per hour it should not matter whether it is moved by a mechanical engine or gravity; it is still an instrument of great destruction.

The facts indicate that the defendant was attempting to drive his car while intoxicated. He was attempting to start the engine and drive his vehicle out of a drainage ditch in the presence of a concerned citizen who noticed the obvious signs of intoxication. Simply put, if the battery of the car had been connected properly, the defendant would have been driving on public streets in this community. The potential for destruction was great, and is exactly what the actual physical control legislation and judicial decisions were intended to prevent. If the driver in Lathan, *supra*, can be found guilty of being in actual physical control of an automobile which a one-ton tow truck could not remove from a mudhole, then surely the defendant in this case can be equally guilty of attempting to drive a vehicle with a disconnected battery. A vehicle with a disconnected battery is not so incapacitated that it is render totally useless; it can be easily

reconnected. If it still won't start it can then be "jump-started" by another vehicle or, in the case of a "stick shift", it can be push started by people or gravity and started by "popping the clutch." Had the defendant availed himself to any of these techniques, he would have been an accident waiting to happen.

CONCLUSION

Based upon the foregoing, the State respectfully submits that the defendant's Petition for a Writ of Habeas Corpus be denied and that the matter proceed to trail as scheduled.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

DUI Admission of Phlebotomist's Affidavit

CODE
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Attorney for Plaintiff
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

PHLEBOTOMIST AFFIDAVIT WAS PROPERLY ADMITTED, THUS NEITHER THE STATE NOR THE COURT VIOLATED THE APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES.

50.315(6) states:

If, at or before the time of the trial, the defendant establishes that:

(a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and

(b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined, the court may order the prosecution to produce the witness and may continue or the trial for any time the court deems reasonably necessary to receive such testimony. . .

The Appellant failed to meet either requirement. Thus, the Appellant effectively waived her statutory rights by failing to argue, at the time the affidavit was offered, there was a substantial and bona fide dispute regarding the facts and it was in the best interest of justice that Cindy Miller be cross-examined. (TOP April 29, 1999, pg.70-77.) DeRosa v. Dist. Ct., 115 Nev. Adv. Op. 33 (August 27, 1999). The Nevada Supreme Court in DeRosa stated, "Trial counsel may effectively waive a defendant's statutory rights. Here, counsel for DeRosa and Thomas did so by failing to argue that there was a substantial and bona fide dispute of fact regarding the use of the phlebotomists' declaration. . ." Id. Thus Judge Schroeder was correct in admitting Cindy Miller's Affidavit pursuant to the statute. (TOP April 29, 1999, pg. 80, ln. 17-25.)

The only basis for the Appellant's objection to the admission of Cindy Miller's was its reliance on Raquepaw v. State, 108 Nev. 1020, 843 P.2d 364 (1992). (TOP April 29, 1999, pg. 74, ln. 5-11.) In DeRosa the Nevada Supreme Court effectively overruled Raquepaw. "We discern little distinction between the trustworthiness of the affidavits used in Raquepaw and the trustworthiness of the affidavits and declaration used in the instant cases. Thus, to the extent that our holding today is inconsistent with our holding in Raquepaw, Raquepaw is overruled. Id.

B. The Affidavit of Cindy Miller was Properly Admitted Pursuant to NRS 51.315 and the Confrontation Clause of the Sixth Amendment.

Assuming arguendo, the Respondent had not complied with NRS 50.315-50.325 Cindy Millers Affidavit was still admissible because the Respondent met the requirements of NRS 51.315(1). NRS 51.315 states:

1. A statement is not excluded by the hearsay rule if:
(a) Its nature and the special circumstances under which it was made offer strong assurances of accuracy; and
(b) The declarant is unavailable as a witness.

The Respondent met the unavailability requirement because on March 20, 1999, Cindy Miller passed away due to cancer. (See State's Exhibit A). Additionally, the Respondent met the first prong, because the Affidavit by its nature and the special circumstances under which it was made offered strong assurances of accuracy. (TOP April 29, 1999, pg.71, ln. 2-25 & pg.72, ln.1-10.) Judge Schroeder before determining that Cindy Miller's Phlebotomist Affidavit offered strong assurances of accuracy he applied the rule pronounced in Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980). Judge Schroeder was correct in his determination as evidenced by the Nevada Supreme Court decision in DeRosa. "Such documents are prepared routinely and record objective facts, not subjective observations. The affiant and declarant are trained professionals whose employment depends on ensuring accuracy in the performance of their duties. Under the circumstances of the documents' preparation, we perceive little motive to lie or fabricate on the part of the affiant or declarant." DeRosa, 115 Nev. Adv. Op. 33. Thus the Court properly admitted Cindy Miller's Affidavit because it was an exception to the hearsay rule and the Affidavit was not violative of Appellant's Sixth Amendment right to confront witnesses.

Dated this _____ day of _____, .

DUI Jurisdiction Issues

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IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

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MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

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III. ARGUMENT

CHARGING CRIMINAL MISCONDUCT
AS A WASHOE COUNTY CODE VIOLATION

The Appellant alleges that it was improper to prosecute the defendant under the Washoe County Code. However, the lower court found that the crime was committed, in part, outside of the city limits. "So the trooper has stated that part of the time that he, the defendant -- at least he did on redirect examination, that part of the time he was going through county as well as through city. So that in and of itself brings it within the jurisdiction of the county."

Even if the crime had occurred completely within the city limits, dismissal or reversal would be improper. NRS 173.075(3) provides that:

> The indictment or information must state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission is not a ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

NRS 173.075(3). (Emphasis added).

The Supreme Court has applied this reasoning to criminal complaints, as well. See, Ex parte Noyd, 48 Nev. 120 (1924).

CONCLUSION

For the above reasons, the State of Nevada respectfully requests that the Appellant's conviction be affirmed.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

Washoe County, Nevada

By_____

Deputy District Attorney

DUI Felony Sufficiency of Priors Full Discussion

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

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III. ARGUMENT

REPLY TO DEFENDANT'S SENTENCING MEMO OF LAW
PRIOR DUI DOCUMENTATION INSUFFICIENT FOR FELONY ENHANCEMENT

The Reply is based on the following POINTS AND AUTHORITIES incorporated herein by this reference, Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 179 (Ill. 1997), North v. Russell, 427 U.S. 328, 96 S.Ct. 2709 (Ky. 1976), Dugan v. Ohio, 277 U.S. 61, 48 S.Ct. 321 (1928), Dressler v. State, 107 Nev. 687 (1991), Pettipas v. State, 106 Nev. 377 (1990), Jones v. State, 105 Nev. 124 (1989), Koenig v. State, 99 Nev. 780 (1983), Burleigh v. State Bar of Nevada, 98 Nev. 140 (1982), NRS 4.010, NRS 484.3792, all the pleadings, papers and documents on file with the Court in these matters, and any oral argument requested by the Court.

The first issue raised by the defendant's memo is that the State is required to present proof of prior offenses at the sentencing hearing, citing Robertson v. State, 109 Nev. 1086 (1993). The State has done this. The prior criminal convictions have been lodged in the Court's file in CR the entire time this matter has been pending before this Court. These documents were transferred with all the other documentation from Sparks Justice Court. Further, both parties have referenced these documents during hearings on the defendant's previously filed motions. The inclusion of this needless argument is a waste of the Court's time given these facts.

The argument is that because the defendant failed to initial three paragraphs of the form the prior is somehow invalid. The defendant's memo buttress this argument by citation to two cases which deal with the right to counsel. *See*, Pettipas v. State, 106 Nev. 377 (1990), and Bonds v. State, 105 Nev. 827 (1989).

The Nevada Supreme Court has long acknowledged that the standard of analysis for prior criminal convictions which emanate from justice courts and municipal courts is not the

same as the stringent standards expected from district courts. In Koenig v. State, 99 Nev. 780 (1983), the Court distinguishes misdemeanor pleas from felony pleas and states:

> The same stringent standard does not apply to guilty pleas in misdemeanor cases. In evaluating the procedures used and the court record made in municipal and justice court prosecutions for misdemeanors, the realities of the typical environment of such prosecutions in these courts of limited jurisdiction cannot be ignored. So long as the court records from such courts reflect that the *spirit of constitutional principles is respected*, the convenience of the parties and the court should be given considerable weight, and the court record should be deemed constitutionally adequate. (Citations omitted)

Koenig, 99 Nev. at 789 (emphasis added). *See also*, Jones v. State, 105 Nev. 124 (1989) (The Nevada Supreme Court supports the "spirit of constitutional principles" analysis of Koenig when analyzing prior criminal convictions memo cites no case law for this proposition. There is case law in Nevada which holds that the defendant's position is simply wrong. *See*, Dressler v. State, 107 Nev. 687 (1991).

In Dressler a bench trial was conducted on a felony DUI. The appellant was found guilty. At sentencing the State offered a prior criminal conviction from Lassen County, California. The charging document stated that the prior criminal conviction was from San Mateo County, California. The State moved to amend the information by interlineation after conviction, and noted that the prior criminal conviction had been admitted into evidence at the preliminary hearing and no prejudice would result from amending the information. Id., 107 Nev. at 688.

The Nevada Supreme Court addressed these facts and held, ". . . unless the defendant can show that an omission or inaccuracy in describing a prior conviction had prejudiced him, the state is not precluded from using that prior conviction in seeking an enhancement of the defendant's punishment." Id., 107 Nev. at 689. The Supreme Court stated that the charging document gave the appellant sufficient notice prior to the amendment even with a totally incorrect court. The Supreme Court went on to note that no prejudice was alleged by

appellant and "it is unlikely [appellant] was misled by the typographical error complained of." Id.

The ensuing salvo in the defendant's onslaught is that the prior criminal convictions do not comply with NRS 176.105. Indeed, they may not. The Nevada Supreme Court has held that this does not constrain their use to enhance the defendant's sentence. In Pettipas, *supra*, the Court addressed the question of what is sufficient proof of a prior criminal conviction for enhancement in a felony DUI. The appellant claimed that "certified copies of formal, written judgements of conviction" were required. Id., 106 Nev. at 379. The Court disagreed, and stated:

> NRS 484.3792(2) does not require that a prior conviction be evidenced by a formal, written judgement of conviction. That statute merely requires that a prior offense be evidenced "by a conviction." In the present case, appellant's prior convictions were evidenced by certified copies of docket sheets and other documents from the courts in which the convictions were entered. These documents are sufficient to show that appellant was actually convicted of misdemeanor DUI in those proceedings. Therefore, the district court did not err when it determined that appellant's prior convictions did not have to be evidenced by certified copies of formal,
> written judgments of conviction.

A modicum of legal research reveals that NRS 176.105 has only been cited in the Nevada Reporter on five occasions. Bradley v. State, 109 Nev. 1090 (1993), Jones v. State, 105 Nev. 124 (1989), State v. Eighth Judicial District Court, 100 Nev. 90 (1984), Miller v. Hayes, 95 Nev. 927 (1979), and Reuvelta v. State, 86 Nev. 224 (1970). The defendant's memo again plays hide the ball when dealing with these cases. The defendant's memo cites to Bradley, however he provides no insight on why that case may be relevant to the issue presented. An explanation for such an omission is that the case is neither on point with the facts or the issues presented.

For some reason, known only to the defendant, he fails to address Jones. Jones is a case directly on point with the issue raised in the defendant's memo. The pertinent issue in Jones was that the appellant claimed that the district court improperly sentenced him on a third

offense DUI because it relied on prior criminal convictions from California which did not comport with NRS 176.105. The Supreme Court, relying on Koenig, *supra*, specifically held that NRS 176.105 does not apply to these types of situations. Jones, 105 Nev. at 125-26. In conclusion, the attempt in the defendant's memo to say that this Court should not use the prior criminal convictions because they do not comply with NRS 176.105 is not supported by the holdings of the Nevada Supreme Court.

Next in order in the defendant's memo is the claim that Phipps v. State, 111 Nev. 1276 (1995), precludes the use of the Lyon County prior because the date of conviction may be plead incorrectly. Phipps is not persuasive authority for this proposition. Phipps addressed whether a prior criminal conviction where the date of the offense is either "not contained" or "not discernable" in the documentation presented can be used for enhancement. Phipps, 111 Nev. at 1280. The Nevada Supreme Court held that it can not. The Court noted that it was the date of the offense which triggered the enhancement language of NRS 484.3792(2).

Does the holding in Phipps require that this court not consider the Lyon County prior as alleged? Absolutely not. The error complained of in the defendant's memo calls attention to the date of conviction, not the date of the offense. Both the Nevada Supreme Court and the Nevada Revised Statues note that it is the date of offense which is critical for felony enhancement, not the date of conviction. *See*, Phipps, *supra*, Pfohlman v. State, 107 Nev. 552 (1991) and NRS 484.3792(2). There is no logical explanation presented in the defendant's memo for an extension of the ruling in Phipps to cover such a nonessential date in the pleading. The prior offenses alleged both occurred within seven years of the pending cases. The dates of the offenses are correctly alleged. The State can amend the Information if it chooses to do so, and the defendant can be sentenced as a felon. *See*, Dressler, *supra*.

The defendant's memo moves on to a claim that the both prior criminal convictions are invalid because the magistrate who took the plea was not an attorney. Lay attorneys are specifically allowed in Nevada pursuant to the Nevada Constitution, Art. 6, § 8, and NRS 4.010. "Statutes are presumed to be valid, and the burden is on the challenger to make a

clear showing of their unconstitutionality." Childs v. State, 107 Nev. 584, 587 (1991)(quoting Sheriff v. Martin, 99 Nev. 336 (1983)). The Nevada Supreme Court has held, "[c]ourts presume that a statute is constitutional, and are reluctant to invalidate a statute when the purpose of that statute is in the best interests of the public." Lucky v. State, 105 Nev. 804, 809 (1989)(citing Ex parte Iratacable, 55 Nev. 363 (1934)). Unless the defendant makes a "clear" showing that NRS 4.010 is unconstitutional this argument is not an appropriate reason to prohibit the use of either prior criminal conviction.

The defendant's memo relies on North v. Russell, 427 U.S. 328, 96 S.Ct. 2709 (1976), and a string cite to other cases as precedent for his proposition. Again, the defendant's memo performs legal slight of hand when it states, "[o]ther state jurisdictions have adopted the Defendant's argument in applying these minimum constitutional requirements *based on the United States Supreme Court decision in North v. Russell*." and then cites three state court opinions. Defendant's memo, p. 7, ll. 15-20 (emphasis added). The slight of hand comes from the fact that two of the three opinions cited were decided prior to North v. Russell. They could not be "based" on North v. Russell, because the case did not even exist.

The one opinion which does cite to North v. Russell does not base its decision on that case. Further, that case was a first degree murder prosecution in a state which allowed lay judges on this type of serious matter. In State v. Dunkerley, 365 A.2d 131 (1976), the Vermont Supreme Court states, "the issue squarely before this Court that was not met by the Untied States Supreme Court in the North case is: Is it legally permissible, as a matter of due process, to be tried by a potentially lay court and no other?" Dunkerley, 365 A.2d at 132. The Dunkerley decision then goes on to adopt the rationale of the two dissenting justices in North v. Russell. For this reason, the position taken in the defendant's memo is disingenuous.

The defendant's memo makes the argument that North mandates legally trained judges in all cases where jail sentences are imposed. This argument is not correct. North addressed a two- tier judicial system which has no resemblance to the judicial system found in Nevada. The Court affirmed the convictions when a lay judge was used. The Court also noted

that their, "concern in prior cases with judicial functions being performed by nonjudicial officers has also been directed at the need for independent, neutral, and detached judgement, not at legal training. (Citations omitted)." North, 427 U.S. at 337. The Court then goes on to note its approval of the use of lay persons making legal decisions. Id., 427 U.S. at 337-38.

What is not found in any portion of the North decision is a requirement for trial de novo when a lay judge is used. It also bears noting that the appellant in North actually went to trial. The issue before this Court is a plea of guilty before a lay judge. This issue was also not addressed by the North decision. Lay judges in courts of lesser jurisdiction have a long and approved history in our country.[25] The type of training and qualification required of a judge are often left to legislatures and state constitutions to determine. Such a policy is approved by the United States Supreme Court. In Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 179 (Ill. 1997), the United States Supreme Court states:

> Of course, most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828, 106 S.Ct. 1580, 1588-89, 89 L.Ed.2d 823 (1986). Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar. *See*, e.g. Aetna, *supra*, at 820-821, 106 S.Ct., at 1584-1585; Tumey v. Ohio, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927); 28 U.S.C. §§ 144, 455; ABA Code of Judicial Conduct, Canon 3C(1)(a)(1980). But the floor established by the Due Process Clause clearly requires a "fair trial in a fair tribunal," Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case. *See*, e.g. Aetna, *supra*, at 821-822, 106 S.Ct. at 1585-1586; Tumey, *supra*, at 523, 47 S.Ct., at 441.

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[25]For a detailed discussion of the need for lay judges in states with sparse population *see generally*, North v. Russell, *supra*, Shelmidine v. Jones, 550 P.2d 207, 211 (Utah, 1976), and Young v. Konz, 91 Wn.2d 532, 540, 588 P.2d 1360, 1366 (Wash. 1979)(Young II). It is respectfully submitted that the lack of attorneys in outlying areas of Nevada is similar to the situations discussed in North, Young II and Shelmidine. The overpopulated status of both the bar and the state found in California were some of the reasons for the rejection of the lay judge system in Gordon, *infra*. The Gordon case is distinguishable for these reasons.

Bracy, 520 U.S. at ___, 117 S.Ct. at 1797. There exists no known United States Supreme Court case which holds that a plea taken by a lay judge is per se unfair and violative of the Due Process Clause of the United States Constitution.

The State will concede that the Nevada Supreme Court has not yet addressed this issue. A number of our sister jurisdictions have looked at North and its progeny. These cases also often address the case cited in the defendant's memo which requires all judges to be attorneys, Gordon v. Justice Court, 12 Cal.3d 323, 115 Cal.Rptr. 632, 525 P.2d 72 (1974), cert denied, 420 U.S. 938, 43 L.Ed.2d 415, 95 S.Ct. 148 (1975). Few courts follow the Gordon, decision. The Washington Supreme Court states that Gordon "is clearly the minority position." Young v. Konz, 91 Wn.2d 532, 540, 588 P.2d 1360, 1365 (1979)(Young II). The majority opinion is that states are free to have lay judges. *See*, State ex rel. Collins v. Bedell, 194 W.Va. 390, 460 S.E.2d 636 (1995), Walker v. State, 207 Ga.App. 559, ___, 420 S.E.2d 17, 18 (Ga.App. 1992)(noting that the decision in North, "did not hold that a system providing for a trial de novo was the only system which would satisfy due process requirements."), Canaday v. State, 687 P.2d 897 (Wyo. 1984), Young II, *supra*, Young v. Konz, 88 Wn.2d 276, 558 P.2d 791 (1977)(Young I), Treiman v. State ex rel. Miner, 343 So.2d 819 (Fla. 1977), Palmer v. Superior Court in and for Maricopa County, 114 Ariz. 279, 560 P.2d 797 (1977), People v. Sabri, 47 Ill.App.3d 962, 362 N.E.2d 739 (1977), Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976), Shelmidine v. Jones, 550 P.2d 207 (Utah 1976), and Ex Parte Ross, 522 S.W.2d 214 (Tex.App. 1975), *but see*, Gordon, *supra*, Dunkerley, *supra*, and City of White House v. Whitley, 979 S.W.2d 262 (Tenn. 1998)(Tennessee Supreme Court "reject[s] the rationale of North v. Russell," *supra*, and decides matter on State Constitutional grounds). It should be noted that not all systems cited above provided for a de novo trial when a lay judge has presided over a trial. The systems in Arizona, Georgia, Wyoming, New Mexico, Utah, and West Virginia all had a legally trained judge conduct a review of the record, but did not mandate a new trial. The majority of

case law supports the system in Nevada. The defendant's memo presents no cogent argument for a departure from this policy.

The defendant's memo's next issue is that because administrative assessments are imposed the prior criminal convictions are invalid. The defendant's memo claims that because judges impose these statutory fees they somehow are no longer impartial. As support for this ludicrous position the defendant's memo cites Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1976) and Connally v. Georgia, 429 U.S. 245, 97 S.Ct. 546 (1977). The claim is incorrect. The citation to Ward and Connally are not on point. The defendant's memo fails to acknowledge the rulings of both the United States Supreme Court and the Nevada Supreme Court in area of financial bias of a judge. A brief survey of those cases will demonstrate

that the imposition of an administrative assessment fee is not unconstitutional.

The defendant's memo fails to address the two primary United States Supreme Court cases regarding judicial bias. The seminal cases which gave rise to this area of inquiry are Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), and Dugan v. Ohio, 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784 (1928). *See,* United Farm Workers of America, AFL-CIO v. Arizona Agricultural Employment Relations Board, 727 F.2d 1475, 1477-1478 (C.A. 9 (Ariz.) 1984). By holding the issue raised by the defendant's memo up to the facts and reasoning of these cases it becomes clear that no impropriety has occurred.

In Tumey the United States Supreme Court held that a petitioners Due Process rights were violated when he was forced to trial before a judge who also happened to be the mayor. The mayor was responsible for both executive and judicial functions in the village. He was "chief conservator of the peace," and also responsible for the police in the village. Id., 273 U.S. at 519, 47 S.Ct. at 440. Between May and December of 1923, the mayor personally received $696.35 as a result of convictions he imposed while acting as a "liquor judge". Id., 273 U.S. at 522, 47 S.Ct. at 441. This sum was in addition to his regular pay. The Court noted that "no fees or costs in such cases are paid him, except by the defendant, if convicted. There is,

therefore, no way by which the mayor may be paid for his service as judge, if he does not convict those who are brought before him . . . . " Id., 273 U.S. at 520, 47 S.Ct. at 440. Finally, the Court noted that the mayor possessed primarily executive functions, with the duty to supervise law enforcement officers, other executive officers, and looking after the finances of the village. Id., 273 U.S. at 533, 47 S.Ct. at 444. With these factors in mind, the United States Supreme Court held that "[i]t is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his acquittal." Id., 273 U.S. at 532, 47 S.Ct. at 444.

One year after the Tumey decision the United States Supreme Court again had an opportunity to consider financial bias as it pertained to a judge. In Dugan v. Ohio, *supra*, the Court again addressed a "mayors" court in Ohio. The mayor of Xenia, Ohio, had no executive functions. The city was run by a commission. The mayor had only judicial functions. He received a salary which was not dependent on whether he convicted a particular person. The Court noted that it was "true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits." Id. 277 U.S. at 65, 48 S.Ct. at 440. With these facts in mind, the Court distinguished Dugan from Tumey, and found no violation of the petitioner's Constitutional rights. The Court also noted that even though the mayor sat on the commission his "relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote." Id.

The Nevada Supreme Court has had an opportunity to apply Tumey and Dugan in two cases: In the Matter of Ross, 99 Nev. 1 (1983), and Burleigh v. State Bar of Nevada, 98 Nev. 140 (1982). Both cases addressed the propriety of the State Bar of Nevada sitting as an adjudicative body over its members, and also the propriety of that body retaining fines it collected and applying them to the coffers of the State Bar. Ross and Burleigh both raised Due Process claims to this procedure. In Burleigh the Nevada Supreme Court, relying on Dugan,

found that the procedures were not violative of Due Process because the panel members who fined the petitioner had no financial stake in the outcome of the decision, and they possessed no executive responsibilities for the finances of the Bar. Burleigh, 98 Nev. at 144.

The following year, the Nevada Supreme Court considered Ross. The facts were considerably different than those presented in Burleigh. In Ross the State Bar hired an investigator to look into alleged improprieties in the handling of an estate. The State Bar expended $34,000.00 in costs as part of its investigation. The State Bar was operating at a deficit of

$27,156.00 during the investigation. The sums expended to investigate the petitioners represented 20% of the annual budget of the State Bar. Id., 99 Nev. at 8. The State Bar president was also on record stating that if there was a finding of unethical behavior, "*later perhaps we could petition the Court to recoup some of the expenses which have been involved . . . .* " Id., 99 Nev. at 4 (emphasis in original). The Nevada Supreme Court found that the tribunal's financial interest in the outcome was a violation of the petitioners Due Process rights to a fair and impartial tribunal. The Court also distinguished these facts from Burleigh and Dugan based on the lack of financial interest found in those cases. Ross, 99 Nev. at 10-11.

In applying these four cases to the facts of the case under consideration it is clear that the de minimis assessment imposed in all criminal cases falls squarely within the logic of Dugan and Burleigh. Tumey and Ross can be distinguished because of the direct financial control and interest the tribunal had in the outcome of the proceedings. The cases cited in the defendant's memo were developed from the Tumey decision, and are distinguishable for the same reason.

The judge involved in both of the prior criminal convictions was paid the same amount whether the defendant was found guilty or not guilty. There is no indication that the judge was involved in any policy making for the cities where they worked. There is also no indication that they had any responsibility for law enforcement beyond their judicial duties. Finally, the defendant's memo does not cite to any control or interest in the financial affairs of

Canal Township, or the City of Sparks that either judge may have had. There was no incentive for either judge to be anything other than the impartial finder of fact and law that the Constitution requires. The defendant's Due Process rights have not been violated. His memo makes a claim unsupported by the facts or the law. After viewing all the applicable law his claim clearly must fail.

The departing allegation in the defendant's memo is that the Lyon County prior has an improper charging document. This argument is no more persuasive than the claim that the evidence of prior criminal convictions does not meet the requirements of NRS 176.105, *supra*. The State would simply request that the Court refer to the response to that argument, *supra*. The documents meet the requirements of the Nevada Supreme Court as announced in Jones, *supra*.

DUI Forced Blood Draw

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Nevada Revised Statute 484.383 explicitly allows a police officer to direct a person previously convicted of a DUI offense within the last seven years, to submit to a blood test.

The Defendant by driving his Volkswagen upon Wells Avenue located in Washoe County, Nevada, impliedly consented to an evidentiary test of his blood in order to determine its alcoholic content. Nevada law states in pertinent part:

> 1. Except as otherwise provided in subsections 3 and 4, any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his consent to an evidentiary test of his blood, urine, breath or other bodily substance for the purpose of determining the alcoholic content of his blood or breath. . .
>
> Nevada Revised Statutes 484.383(1).

Subsections three and four of NRS 484.383 provide exceptions to the implied consent law. Subsection 484.383(3) exempts persons who are afflicted with hemophilia or use anticoagulants from an evidentiary blood test. Subsection 484.383(4)(a) explains when a person may refuse a blood test. Subsection 484.383(4)(b) describes when a person who requests an evidentiary blood test may have to pay for the requested test.

Under NRS 484.383(4) it is clear that as a general rule a defendant may refuse a blood test if a breath test is available. However subsection 484.383(4)(c) removes the breath test as a viable option for defendants who have a prior conviction for a driving under the influence offense.

> 4. If the alcoholic content of the blood or breath of the person to be tested is in issue:
>
> (c) A police officer may direct the person to submit to a blood test as set forth in subsection 7 if the officer has reasonable grounds to believe that the person:
>
> ...(2) Has been convicted within the previous 7 years of:
>
> (I) a violation of NRS 484.379,484.3795, subsection 2 of NRS 488.400, NRS 488.410 or

488.420 or a law of another jurisdiction that prohibits the same or similar conduct.

Nevada Revised Statute 484.383

The Nevada Supreme Court has ruled forcing a blood draw from a suspect, who has a prior conviction for driving under the influence of alcohol, supports Nevada's public policy of keeping drunk drivers off the road.

In *Ebarb v. State of Nevada*, 107 Nev. 985, 822 P.2d 1120 (1991), the Nevada Supreme Court ruled that, "Once an arresting officer has determined that a suspect has a prior DUI conviction the suspect no longer has a right to refuse a blood test." *Ebarb* at 986. Additionally, the Nevada Supreme Court in interpreting DUI statutes has stated, "The implied consent statute should be liberally construed so as to keep drunk drivers off the streets." Id. at 988.

In *Nelson v.City of Irvine* 143 F.3d 1196 (9th Cir. 1998), the Court stated the issue of whether the actions of California police officers, who forced blood tests on suspects who requested a breath test, based on California statutes, was one of first impression in California. *Nelson* at 1201. The Ninth Circuit Court of Appeal[26] in *Nelson,* stated:

> "When interpreting state law, federal courts are bound by decisions of the state's highest court. In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as a guidance. However, where there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts."
>
> Id. at 1206 &1207.

Unlike California, the Nevada Supreme Court has ruled on this issue. *Ebarb* at 107. Thus, the Appellate Court would look to the Nevada Supreme Court in interpreting Nevada's statutes. Therefore, based on the statements by the Ninth Circuit Court of Appeal it

[26]The Ninth Circuit Court of Appeal in *Nelson* made the statement in deciding whether to dismiss Nelson's claim under California Civil Code § 52.1.

can be inferred it would not reach the same conclusion as to Nevada statutory law which allows officers to force a blood draw when there are reasonable grounds to believe the suspect has a prior conviction for driving under the influence.[27] As such *Nelson*, which does not address the issue of whether forcing a blood draw on a suspect, who has previously been convicted of a DUI, pursuant to an express statute is irrelevant to this case. Therefore the Defendant's evidentiary blood test results should not be suppressed based on the Ninth Circuit Court of Appeal's decision in *Nelson*.[28]

C. Nelson v. City of Irvine has no application because it addressed an issue not raised by the facts of this case.

---

[27]". . . 4. If the alcoholic content of the blood or breath of the person to be tested is in issue:. . . (c) A police officer may direct the person to submit to a blood test as set forth in subsection 7 if the officer has reasonable grounds to that the person: . . . (2) Has been convicted with in the previous 7 years of: (I) A violation of NRS 484.379, 484.3795 subsection 2 of NRS 484.400, NRS 488.410 or 488.420 or a law of another jurisdiction that prohibits the same or similar conduct; N.R.S. 484.383.

[28]Assuming arguendo that *Nelson* effectively overrules *Ebarb* and an officer cannot force a blood draw from a suspect with a prior DUI conviction, NRS 484.383 is still constitutional. Pursuant to NRS 484.383(4)(c) the legislature has expressly stated an officer may direct a person to submit to a blood test if the officer has reasonable grounds to believe the person has previously been convicted of a driving under the influence within the previous seven years. However, the legislature also has expressly stated in NRS 484.383(4)(a) a person may refuse to submit to a blood test if means are reasonably available to perform a breath test. Thus, in Nevada unlike California, an officer may direct a defendant to take a blood test and not inform him/her of any other available tests, but may not force the blood draw unless the defendant refuses to take an evidentiary test required under 484.383(1).

Nevada's current statutory construction under NRS 484.383 is constitutional, thus the Defendant's request to suppress the results of the evidentiary blood test should be denied.

There are two reasons why *Nelson* is inapplicable to this case. First, *Nelson* is factually distinguishable and second, the Ninth Circuit Court of Appeals was interpreting the conduct of police officers under California, not Nevada law.

Nelson, addresses the issue of whether an officer can force a blood draw from a defendant, **when the defendant has expressed a preference for, or consented to, an available breath or urine test.** *Nelson at* 1200. In this case, the Defendant never requested, consented or expressed a preference for an evidentiary breath or urine test. The Court of Appeal specifically limited its holding to defendants who verbally requested or consented to undergo a breath test instead of a blood test. "However, the City of Irvine's insistence upon obtaining blood samples from Mauricio Fernandez, Jeffrey Capler, and other class members who requested or consented to undergo breath tests instead of blood tests was unreasonable if breath tests were actually available." Id. at 1203.

"The Supreme Court has not announced a *Miranda*-type requirement that suspects be advised of their Fourth Amendment rights." Id. "Thus, the Fourth Amendment is not violated by the City of Irvine's failure to advise class members, who did not request or consent to a urine or breath test, of their right to choose another the alternative tests." Id.

Nelson v. City of Irvine interprets California statutory law.

In *Nelson,* the Ninth Circuit Court of Appeal determined the constitutionality of arresting officers actions based on a California statute. "Further, California law requires that breath and urine tests be available: a DUI arrestee 'has the choice of whether the test shall be of his or her blood, breath, or urine, and the officer shall advise the person that he or she has that choice.' Cal. Veh. Code §23157 (West 1997). "Nevada has no such law. Thus any application of *Nelson* to the actions of Nevada police officers based on Nevada's statutory rules is misplaced.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

DUI Horizontal Gaze Nystagmus

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

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III. ARGUMENT

THE ADMISSION OF HORIZONTAL GAZE NYSTAGMUS EVIDENCE WAS PROPER

The Appellant complains that testimony concerning a Horizontal Gaze Nystagmus test was improperly allowed at trial and cites to People v. Kirk, 681 N.E. 2d 1073 (Ill.App. 4 Dist. 1997). That case, however, is founded upon Frye v. United States, 293 F. 1013 (D.C.Cir. 1923). The Nevada Supreme Court has never adopted that decision. Santillanes v. State, 104 Nev. 699 (1988).

The test, in Nevada, is "to assess the admissibility of scientific evidence, like other evidence, in terms of its trustworthiness and reliability." Santillanes v. State, 104 Nev. 699 (1988). Nor is it necessary to introduce new and redundant evidence of the "reliability and trustworthiness" of a scientific test that has been judicially accepted for many years. State, Dept. of Motor Vehicles v. Bremer, 113 Nev. 805 (1997). The Nevada Supreme Court has referred to the Horizontal Gaze Nystagmus test on at least four occasions without disapproving its use. See, State, Dept. of Motor Vehicles and Public Safety v. Evans, 114 Nev.Adv.Op. ___, 952 P.2d 958 (1998), Angle v. State, 113 Nev. 757 (1997), Johnson v. State, 111 Nev. 1210 (1995), State, Dept. of Motor Vehicles and Public Safety v. McLeod, 106 Nev. 852 (1990).

THE TROOPER WAS NOT AN EXPERT WITNESS AS CONTEMPLATED BY NEVADA'S DISCOVERY STATUTES

The State was required to provide notice of the Trooper pursuant to NRS 174.234(2) only if it intended to offer his testimony as that of an expert witness. NRS 174.234(2). The State did not offer the Trooper as an expert witness.

NRS 50.265 allows a lay witness to offer his opinion or draw inferences when rationally based upon the perception of the witness. NRS 50.265. If a witness has been qualified as an expert, then the witness may testify to matters within the scope of his specialized knowledge. NRS 50.275. An expert's opinion may be based on facts other than that perceived by the witness. NRS 50.285.

Here, the Trooper was not qualified as an expert. As to evidence of a Horizontal Gaze Nystagmus test, the Trooper only testified that he gave such a test and, in conjunction with the results of other tests, was of the opinion that the Appellant had been driving under the influence of an intoxicating beverage. TOP, pages 20-21. The Trooper did not testify as to what he specifically observed, its correlation with any specific blood alcohol level or the scientific foundations for such a correlation.

Nor was the Trooper qualified as an expert as to the breath machine and the breath test. The Trooper merely testified that he, following a checklist, had the Appellant blow into the Intoxilyzer 5000 breath machine. TOP, pages 22-25 and 36-37. The Trooper did not testify as to the workings of the machine, either scientifically or mechanically. He testified only that the machine appeared to be working, the Appellant blew into it, and a result was obtained.

EVEN IF THE TROOPER WAS AN EXPERT THERE WAS NO ERROR IN ALLOWING HIS TESTIMONY

"A trial court is vested with broad discretion in fashioning a remedy when, during the course of the proceedings, a party is made aware that another party has failed to comply fully with a discovery order." Jones v. State, 113 Nev. 454 (1997). The appellate court "will not find an abuse of discretion in such circumstances unless there is a showing that the State has acted in bad faith, or that the non-disclosure results in substantial prejudice to appellant...." Jones v. State, 113 Nev. 454 (1997). There has been, nor can there be, any showing of bad faith on the part of the State. Indeed, the State maintains that it was not required to provide the requested notice. Furthermore, there can be no showing of prejudice to the

Appellant. As mentioned at the trial, the defense was provided with a notice of witnesses, to include the Trooper, and complete discovery of the police reports. TOP, page 11.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
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By_____

Deputy District Attorney

DUI State of Nevada as Plaintiff

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

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* * *

THE STATE OF NEVADA,

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

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THE STATE OF NEVADA WAS THE PROPER NAMED PLAINTIFF IN THIS ACTION

The Appellant fails to cite to any authority for his proposition that the State of Nevada is not a proper party to Washoe County Code violations. Although "[i]t is constitutionally permissible for City to prosecute violations of its ordinances in City's name rather than in the name of the State", Williams v. Municipal Judge of City of Las Vegas, 85 Nev. 425 (1969), it is likewise permissible to prosecute violations in the name of the State. In fact, the Constitution of the State of Nevada provides that: "The style of all process shall be 'The State of Nevada' and all prosecutions shall be conducted in the name and by the authority of the same." Nev. Art. 6, sec. 13. If a complaint is accompanied by an arrest warrant, the arrest warrant shall be in the name of the State of Nevada. NRS 171.108. NRS 171.1773 allows a citation to be in the name of the State of Nevada or in the name of the county, city or town. NRS 171.1773.

Dated this _____ day of _____, .

RICHARD A. GAMMICK

District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney